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No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

BUILDING INDUSTRY ASSOCIATION OF SUPERIOR CALIFORNIA, ET AL.,

Petitioners,

v.

GALE NORTON, ET AL.,

Respondents,

ENVIRONMENTAL DEFENSE CENTER, ET AL.,

Respondent-Intervenors.

On Petition for Writ of Certiorari to United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the federal power to regulate commerce among the several states extend to regulation under the Endangered Species Act of species or activities that are *entirely intrastate* and *noneconomic in nature*?

2. Is an agency justified, under the Administrative Procedure Act and the Endangered Species Act, in refusing to make available for notice and comment a scientific study on which it indisputably placed "great weight" and which it touted as the "best scientific and commercial data available" merely because that study became available after the notice of proposed rulemaking?

PARTIES TO THE PROCEEDINGS

Petitioners are the Building Industry Association of Superior California, Marvin L. Oates, and the Sacramento Metropolitan Chamber of Commerce. The Rescue Union School District was a plaintiff below but is not a party to this petition. Respondents are Gale A. Norton, Secretary of the United States Department of Interior; the United States Department of Interior; Marshall P. Jones, Jr., Acting Director, United States Fish and Wildlife Service; and the United States Fish and Wildlife Service. Respondent-Intervenors are the Environmental Defense Center and the Butte Environmental Council.

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PETITION FOR WRIT OF CERTIORARI

The Building Industry Association of Superior California, Marvin L. Oates, and the Sacramento Metropolitan Chamber of Commerce respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 247 F.3d 1241 (D.C. Cir. 2001), and is included in Appendix (App.) B. The opinion of the District Court is reported at 979 F. Supp. 893 (D.D.C. 1997), and is also included in Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 8, 2001. That Court's summary denial of the Petition for Hearing En Banc was entered on July 13, 2001, included in Appendix A. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The pertinent provision of the United States Constitution provides that Congress has power "to regulate commerce . . . among the several states." Art. I, § 8, cl. 3.

The pertinent provisions of the Endangered Species Act are found at 16 U.S.C. § 1533 and are set out in Appendix E. The pertinent provisions of the Administrative Procedure Act are found at 5 U.S.C. § 706(2)(A),(D) and 5 U.S.C. § 553(b)-(c) and are set out in Appendix D.

STATEMENT OF THE CASE

Landowners throughout the California Central Valley, like Petitioner Marvin Oates, run the risk of violating federal law by simply walking on their land. Placing a foot in a puddle of water can result in heavy fines or even imprisonment if it harms the small and delicate fairy shrimp. Fairy shrimp are tiny, fly-sized freshwater crustaceans that are found only in California's Central Valley Region. 59 Fed. Reg. 48,136 (September 19, 1994). These wholly intrastate and noncommercial species inhabit small seasonal wetlands, tire ruts, roadside ditches, and backhoe pits. *Id.* at 48,145. The species of fairy shrimp at issue in this case are listed and regulated by the federal government as endangered or threatened under the Endangered Species Act (ESA) which was promulgated under Congress' Commerce Clause power. The Act imposes civil, and even criminal, sanctions on anyone who "takes," or harms, these species—by any means—without a federal permit. *See* 16 U.S.C. §§ 1538(a)(1) and 1540(a) and (b).

Petitioners are, or represent, landowners on whose property the fairy shrimp can be found. These landowners have been frustrated in the use of their land because any disturbance of fairy shrimp habitat—whether wet or dry—may kill or hurt the protected species. *See id.* 59 Fed. Reg. at 48,147-48,149. Without federal authorization, under the ESA, these landowners may not rake, hoe, disc, drain, fill or otherwise modify (or even enter) certain portions of their property, like the small and widely dispersed vernal pools in which fairy shrimp commonly thrive. *See id.* and 16 U.S.C. § 1538(a)(1) and (a)(1)(B). Vernal pools are seasonally wet, isolated water bodies that pond during the winter and spring, and evaporate during the summer. But even during the dry season, these habitat areas contain dormant fairy shrimp eggs that may not be disturbed. As a result of these limitations, Petitioners challenged the authority

of the federal government to regulate these species of fairy shrimp under the Commerce Clause, whereby federal officials effectively control local land use, arguing that the listing of these intrastate, noncommercial species is beyond the regulatory reach of Congress.

When the United States Fish and Wildlife Service listed the fairy shrimp as endangered or threatened, the Service did not establish any connection whatsoever between the fairy shrimp and interstate commerce as required by this Court's recent Commerce Clause decisions. But the district court and court of appeals sustained the listing of these four species of fairy shrimp under the ESA as a legitimate Commerce Clause regulation. Because this Court has struck down similar provisions and "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature," *see United States v. Morrison*, 529 U.S. 598, 613 (2000), Petitioners seek relief in this Court to correct the constitutional conflicts below.

Petitioners also seek relief in this Court to resolve a conflict between the D.C. and Ninth Circuits on a procedural question of national importance. When the Service proposed listing five species of fairy shrimp as endangered or threatened, the Service had very little population data on which to base its listing determination. *See* 59 Fed. Reg. at 48,142. Many of those who commented, including Petitioners, objected to the listing because the Service lacked sufficient information to conclude the species were endangered or threatened. 59 Fed. Reg. at 48,139-48,147. In fact, one species was dropped from the listing and another was downgraded from endangered to threatened when subsequent data, submitted in part by Petitioners, showed the species were more widely distributed than the Service had thought. *Id.* at 48,136 and 48,151.

Nevertheless, during the comment period, the Service obtained a limited study—known as the "Simovich Study"—of

fairy shrimp distribution that filled some (but not all) of the data gaps left open in the proposed rule. App. B-6-7. Although this new study was the most comprehensive study on fairy shrimp population ever conducted and the Service touted it as "the best scientific and commercial data available," upon which it substantially relied for its final listing determination, the Service did not circulate the study for review and comment by interested parties. App. B-6-10.

Petitioners challenged the adequacy of the study to support the final listing determination and the district court agreed with Petitioners that the study should have been circulated for public comment but concluded the failure to circulate did not justify invalidation of the rule. App. C-15-19. The court of appeals also upheld the final listing determination holding that the new study "did no more than provide support for the same decision [the agency] had proposed to take." App. B-8. In other words, if the agency already has its mind made up at the proposal stage, before it has reviewed all the data, no amount of new data need be circulated for public notice and comment even if the agency substantially relies on that data. Petitioners argue, among other things, that this standard encourages uninformed decision making and directly conflicts with *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995), wherein the Ninth Circuit held, on nearly identical facts, that such a study is subject to statutory notice and comment requirements under the Endangered Species Act and the Administrative Procedure Act.

A. Factual Background

The Endangered Species Act directs the Secretary of Interior, through the United States Fish and Wildlife Service, to determine whether any species is endangered or threatened. *See* 16 U.S.C. § 1533(a), App. E-1. That determination must be made solely on the "best scientific and commercial data available" after taking into consideration (1) the status of the species' habitat and range, (2) overutilization, (3) disease or predation, (4) the inadequacy of existing regulations, and (5)

other factors affecting its continued existence. 16 U.S.C. § 1533(a)(1), App. E-1, and (b)(1)(A), App. E-3. Any "interested person" may petition the Service to list a species as endangered or threatened. 16 U.S.C. § 1533(b)(3)(A), App. E-4.

In 1990 and 1991, the Service received petitions to list various fairy shrimp species as endangered. In 1992, the Service proposed the listing of five species of fairy shrimp as endangered or threatened. *See* 57 Fed. Reg. 19,856-19,862 (May 8, 1992). Fairy shrimp are small aquatic invertebrates with elongated bodies and stalked compound eyes, no carapace and 11 pairs of swimming legs. *Id.* at 19,856. These fingertip-sized species are known to survive in freshwater habitats, predominantly in vernal pools and swales. *Id.* Vernal pools are shallow depressions that fill with water during the fall and winter seasons, then evaporate in the spring. The distribution of vernal pools is reported to be highly discontinuous and some aquatic invertebrates, like the fairy shrimp, that are found in these pools occur only in specific geographic areas. *Id.* at 19,857. Fairy shrimp lay eggs that lie dormant through the dry months and hatch when the habitat is filled with rainwater during the fall and winter. *Id.* at 19,856-19,857. The listed species in this case are wholly intrastate, limited to California. 59 Fed. Reg. at 48,147. They have no commercial purpose. *Id.* at 48,149.

The proposal to list the fairy shrimp was controversial from the start, and many people, including Petitioners, submitted comments that questioned or contradicted the data on which the Service relied. *See* 59 Fed. Reg. at 48,138-48,147. After the close of the comment period, the Service extended the date for public comment by six months to collect additional data. 57 Fed. Reg. 36,380. The ESA allows such an extension when "there is substantial disagreement regarding the sufficiency or accuracy of the available data" relevant to the listing determination. 16 U.S.C. § 1533(b)(6)(B)(i), App. E-7. In 1994, the Service published its final rule listing the Conservancy fairy shrimp, the longhorn fairy shrimp, and the vernal pool tadpole shrimp as endangered species, and the vernal pool fairy shrimp as a

threatened species. *See* 59 Fed. Reg. 48,136-48,153. The final rule did not list the California linderiella, as had been proposed, because scientific data submitted by Petitioners' (BIA) consultants showed that the species was more abundant than the Service believed. *Id.* at 48,136. For like reason, the status of the vernal pool fairy shrimp was changed from endangered to threatened.

In response to comments that the Service lacked comprehensive vernal pool sampling data, the Service referenced—for the first time in the final rule—a 1991-1993 field survey known as the "Simovich Study." *See id.* at 48,141. The Service cited this study extensively to support its listing determination but never circulated the study for public review and comment. App. B-6-7. Petitioners challenge the adequacy of that study.

Once listed as endangered or threatened a species is automatically afforded various protections under the ESA. Some of these protections impose duties on federal agencies while others restrict private conduct. Section 7 of the Act requires that federal agencies "insure that any action authorized, funded, or carried out by such agency" will not jeopardize the continued existence of the protected species or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2). Under this section, the agency may deny a permit or license to an applicant if the proposed activity would jeopardize the protected species or adversely modify critical habitat, unless, after consultation with the United States Fish and Wildlife Service (or in some cases the National Marine Fisheries Service), the activity can be modified with "reasonable and prudent" alternatives or measures that are protective of the species. 16 U.S.C. § 1536(b). Under section 9 of the Act, no person may "take" a listed species without a federal permit. 16 U.S.C. § 1538(a)(1). "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). These limitations, as well as other provisions of the Act, apply to nonfederal actors such as Petitioners without regard to whether

the regulated species or activity has a connection with or effect on interstate commerce. Section 11 provides both civil and criminal penalties for violations of the Act. *See* 16 U.S.C. § 1540.

B. Judicial Proceedings

Petitioners filed this suit challenging the listing of the fairy shrimp on various grounds, including: (1) as applied to the fairy shrimp, the listing went beyond the Commerce Clause power of Congress, and (2) the Service did not comply with the procedural requirements of the ESA and the APA to provide notice and opportunity for comment on a study characterized as the "best scientific . . . data available" and on which the Service indisputably placed "great weight" in its final listing decision.

1. The Commerce Clause Challenge

The district court upheld the listing against the Commerce Clause challenge distinguishing *United States v. Lopez*, 514 U.S. 549 (1995), wherein this Court invalidated the Gun-Free School Zones Act because it had "nothing to do with 'commerce.'" App. C-27. Relying heavily on pre-*Lopez* decisions, the District Court held that wildlife may have a substantial effect on interstate commerce and that Congress had power to regulate wildlife even if the protected species was not interstate in character. App. C-27-31.

On appeal the Court of Appeals for the District of Columbia Circuit did not address the merits of Petitioners' Commerce Clause claim. Rather, bound by the "law of the circuit," the court simply noted that the Commerce Clause claim fails under *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998), a split-panel decision of the appellate court, and was asserted "to preserve the possibility of en banc review." App. B-10.

Petitioners timely filed a Petition for Hearing En Banc asking the full court to reconsider their Commerce Clause claim

in light of this Court's recent decision in *Morrison*. In that case, this Court struck down 42 U.S.C. § 13981, which provided a federal civil remedy for victims of gender-motivated violence, because: (1) gender-motivated crimes are not economic activity; (2) the statute contained no jurisdictional element establishing a connection between the regulated activity and interstate commerce; and, (3) the government cannot aggregate attenuated effects on interstate commerce to establish a commerce connection. Petitioners argued that the listing challenge in this case was controlled by *Morrison* and that *National Association of Home Builders* is wholly inconsistent with that decision and should be overruled. But the Petition for Hearing En Banc was denied on July 13, 2001.

2. The Procedural Challenge and Circuit Conflict

The district court determined that because the final rule relied heavily on the "Simovich Study" for "the important proposition that fairy shrimp are rare within their ranges . . . the study should have been made available for notice and comment." App. C-17. But, the district court found that this failure did not justify overturning the rule. App. C-17-19.

On appeal, the circuit court noted the significance of the "Simovich Study:" (1) citing it as the most comprehensive study of vernal pools ever attempted in California; (2) acknowledging that the Service indisputably "placed great weight" on the study; and (3) characterizing the study as "the best scientific . . . data available." App. B-6-9. But the Panel concluded comment by interested parties was not necessary because the study "did no more than provide support for the same decision [the Agency] had proposed to take." App. B-8.

In the subsequent Petition for Hearing En Banc, Petitioners argued that the rule adopted by the Panel for notice and comment directly conflicts with the Ninth Circuit decision in *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392. In that case, the court of appeals held that a study cited in support of the listing of

an endangered species, obtained only after notice of the proposed rule, as in this case, must be circulated for review by interested parties because: (1) the study filled data gaps, (2) the study provided unique information, and (3) the agency relied heavily on the study to support its final rule. Petitioners also argued that the panel decision encourages uninformed decision making, permits preconceived determinations, undermines the goals of public notice and comment, and violates the ESA and the APA. But, as noted above, the Petition for Hearing En Banc was denied on July 13, 2001.

REASONS FOR GRANTING THE WRIT

This case raises a constitutional challenge to the Endangered Species Act which this Court has described as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," *TVA v. Hill*, 437 U.S. 153, 180 (1978). Indeed, the ESA is pervasive and requires the protection of a listed species, like the fairy shrimp, "whatever the cost." *Id.* at 184. These fairy shrimp are found throughout the California Central Valley in habitats such as vernal pools and swales and have been noted in roadside ditches, backhoe pits, and even tire ruts.

These habitat areas are essentially off limits to any person and cover thousands of acres, including prime farm land. Traditional uses of the land, such as smoothing the ruts in a road, plowing a field for planting, or building a new school can result in a "take" of the species, which, if unauthorized, may result in heavy civil fines ($25,000 per violation) or severe criminal penalties, including imprisonment. *See* 16 U.S.C. § 1540(a) and (b). The innocent act of a child riding a bike through a small vernal pool could also harm the fairy shrimp and subject the person to civil or criminal penalties.

It behooves this Court, therefore, to determine the reach of the Commerce Clause in species' protection. Under the lower court decision, there are no limits to the power of Congress to regulate intrastate, noncommercial objects or activities, like the fairy shrimp in this case. But the question presented here is not limited to the fairy shrimp. Approximately half of all species listed as endangered or threatened in the United States are found in only one state. This question is sure to be repeated.

This Court should also review this case to address an important procedural question of notice and comment and to resolve a conflict between the D.C. Circuit and the Ninth Circuit that goes to the heart of the ESA listing process.

I

WHETHER THE FEDERAL POWER TO REGULATE COMMERCE AMONG THE SEVERAL STATES EXTENDS TO REGULATION UNDER THE ENDANGERED SPECIES ACT OF SPECIES OR ACTIVITIES THAT ARE *ENTIRELY INTRASTATE* AND *NONECONOMIC IN NATURE* IS AN IMPORTANT QUESTION THAT THE LOWER COURT DECIDED CONTRARY TO THE DECISIONS OF THIS COURT

This Court has never upheld a Commerce Clause regulation of an intrastate activity that is not economic in nature. *United States v. Morrison*, 529 U.S. at 598, 586, 611. To the contrary, this Court has consistently struck down such regulation, including a prohibition on the possession of a gun within 1,000 feet of a school (*United States v. Lopez*) and a statute authorizing civil damages for gender-motivated crimes (*United States v. Morrison*). The basis for this Court's recent rulings is clear: the Commerce Clause power has limits. It is therefore essential that this Court determine the scope of that power in the context of the Endangered Species Act. That Act, more than any other, challenges the outer limits of Congress' Commerce Clause authority. As applied in this case, the ESA admits of no limits

to the federal regulatory power, intrudes on state sovereignty, and usurps local land use control.

A. *National Association of Home Builders v. Babbitt*, to Which the Lower Court Deferred, Is in Error and Conflicts with the Decisions of This Court

Notwithstanding this Court's recent decision in *United States v. Morrison*, the lower court did not address Petitioners' Commerce Clause challenge on the merits, but deferred to its own insupportable decision in *National Association of Home Builders*, 130 F.3d at 1041. In that case, the Court of Appeals for the District of Columbia Circuit had to determine if section 9 (16 U.S.C. § 1538(a)(1)(B)) of the Endangered Species Act, which makes it unlawful for any person to "take" any endangered or threatened species, exceeded Congress' Commerce Clause power as applied to the Delhi Sands Flower-loving Fly. At the time, there were eleven known populations of the fly, all within an eight-mile radius in San Bernardino and Riverside Counties in California. The dispute arose when the United States Fish and Wildlife Service listed the fly as an endangered species and halted construction of a sorely-needed hospital located in fly habitat in San Bernardino County.

The County and others sued the Service arguing, among other things, that the federal government did not have authority to regulate the "taking" of the fly—a wholly intrastate and noneconomic activity—or interfere in traditional areas of local concern. Plaintiffs relied on *United States v. Lopez*, 514 U.S. 549, wherein this Court struck down the Gun-Free Schools Zone Act as an invalid Commerce Clause enactment. The Act prohibited possession of a gun within 1,000 feet of a school. Although guns are bought and sold and move across state lines, this Court held that the Act "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561. Additionally, this Court found the Act did not contain a jurisdictional element that "would ensure, through case-by-case inquiry, that the firearm

possession in question affects interstate commerce" or that would limit the Act's reach "to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562.

This Court flatly rejected the government's argument that the cost of gun-related crime in the aggregate had a substantial impact on the economy and adversely affected education. "[I]f we were to accept the Government's arguments," this Court stated, "we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* at 564. This Court was simply unwilling to transform Congress' Commerce Clause authority into a general police power like that retained by the States. *Id.* at 567.

But the appellate court in *Home Builders* was not so constrained. Although that case would appear to be a precise fit with *Lopez*, the majority upheld the "take" provision of the ESA as applied to the Delhi Sands Flower-loving Fly. The majority judges in *Home Builders* could not agree on the basis for upholding the "take" provision but held variously that the protection of even noncommercial, intrastate species can be aggregated to show a connection to interstate commerce or that the ESA really regulates habitat, not just species, and that the development of such habitat is obviously connected with interstate commerce. *See Home Builders*, 130 F.3d at 1049-57, 1057-60. One judge even suggested, inexplicably, that the "take" prohibition amounted to regulation of channels of interstate commerce and so could be regulated under the Commerce Clause. *Id.* at 1046-49.

But that decision was patently inconsistent with this Court's rationale in *Lopez*. Like the possession of guns in *Lopez*, the "taking" of the fly in *Home Builders* had nothing to do with "commerce" or any other economic activity. Indeed, the "taking" of the fly, which was not bought and sold on the

open market, had less of a connection to "commerce" than the possession of a gun, an indisputable commercial item.

Additionally, the ESA did not contain a jurisdictional element that would ensure through case-by-case inquiry that the fly, or the "taking" of the fly, would have an explicit connection to or effect on interstate commerce, a lapse fatal to the Gun-Free Schools Zone Act. Nevertheless, the court in *Home Builders* limited *Lopez* to its facts and decided the "taking" provision of the Endangered Species Act, as applied to the fly, was a proper exercise of Congress' Commerce Clause power.

If *Lopez* were not clear enough, however, this Court was even more explicit in a recent decision holding that, in cases like *Lopez*, the Commerce Clause is restricted to activity that is economic in nature and substantially affects interstate commerce. Last year, this Court decided *United States v. Morrison*, 529 U.S. 598, which involved a Commerce Clause challenge to 42 U.S.C. § 13981. That statute provided a federal civil remedy for the victims of gender-motivated crimes. Building on *Lopez*, this Court ruled that the statute could not be sustained under the Commerce Clause.

In *Morrison*, this Court affirmed that every law enacted by Congress must be based on a power enumerated in the Constitution. *Morrison*, 529 U.S. at 607. Although Congress has been given wide latitude under the Commerce Clause, this Court said the modern court has recognized limits to that power. *Id.* at 608. Since 42 U.S.C. § 13981 was focused on "gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce)," this Court determined the proper inquiry was whether gender-motivated crime substantially affected interstate commerce. *Morrison*, 529 U.S. at 609.

This Court adopted *Lopez* as the proper framework for that inquiry and observed that central to the *Lopez* decision was the

noneconomic nature of the statute. *Id.* at 610. And to emphasize the point, this Court stated:

> *Lopez's* review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.

Id. at 611.

This Court also observed that in *Lopez* there was no jurisdictional element establishing a case-by-case connection to interstate commerce and that the *Lopez* decision rested in part on the fact that the "link between gun possession and a substantial effect on interstate commerce was attenuated." *Id.* at 612.

With these principles underlying this Court's jurisprudence, this Court found resolution of the gender-motivated crime statute clear: "[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 613. This Court, therefore, challenged the government's arguments that all gender-motivated crime, a noneconomic endeavor, may be combined to show a substantial effect on interstate commerce. These arguments, this Court stated, are

> substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected [in *Lopez*] as unworkable if we are to maintain the Constitution's enumeration of powers."

Id. at 615.

Thus, this Court held:

> We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.

Id. at 617-18.

For the same reasons, resolution of *Home Builders* should have been equally clear. The "take" provision of the Endangered Species Act prohibits all harmful conduct, however it may occur, and is not directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce, so the proper inquiry was whether the "taking" of the fly substantially affected interstate commerce. Since the "taking" of the Delhi Sands Flower-loving Fly was no more interstate and economic in nature than the possession of a gun in *Lopez* and a gender-motivated crime in *Morrison*, the "take" provision should have been recognized as an invalid Commerce Clause regulation.

Likewise, under the *Lopez* framework, the listing of four species of fairy shrimp as endangered or threatened utterly fails as a valid exercise of the Commerce Clause power. Under *Lopez*, this Court asks: (1) if the regulated object or activity is economic in nature; (2) if the statute has a jurisdictional element establishing through case-by-case analysis a connection to interstate commerce; and (3) if the regulation intrudes on areas of traditional state concern.

First, the fairy shrimp are a very small, isolated species that have no known commercial use. *See* 59 Fed. Reg. at 48,147. The listing of such a species under the ESA–which automatically invokes the protections of the Act, including the "take" provision at issue in *Home Builders, see* 16 U.S.C. § 1538(a)(1)(B)—has by its own terms nothing to do with commerce or any sort of economic activity.

Second, the Endangered Species Act has no jurisdictional element establishing through case-by-case analysis a connection to interstate commerce. To the contrary, the statutory mandate to list a species as endangered or threatened applies across the board to all plants and animals wherever they may be found—intrastate or interstate—and without regard to the species' connection to commerce of any kind.

Indeed, the ESA requires that a listing determination rest solely on the biological status of the species and prohibits a consideration of the economic impacts of the listing:

> Because the Service is specifically precluded from considering economic impacts in a final decision on proposed listing, the Service has not considered possible economic consequences of listing the three fairy shrimp and the vernal pool tadpole shrimp.

59 Fed. Reg. at 48,139.

Also, when the Service considered whether these species were affected by "overutilization for commercial, recreational, scientific, or educational purposes," the Service concluded, succinctly, that this factor was: "Not known to be applicable." *Id.* at 49,149.

And, third, the listing of the fairy shrimp substantially intrudes on the sovereign power of the State to control local land use—an area of traditional state concern. *See FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) ("Regulation of land use is perhaps the quintessential state activity.").

Aside from these three factors, this Court weighs a final factor; that is, whether the basis for the regulation has any logical stopping point. A Commerce Clause enactment that relies on combining attenuated economic impacts and unduly expands the reach of Congress will not be sustained. *See Morrison*, 529 U.S. at 617-18. The listing of the fairy shrimp is a case in point.

The fairy shrimp have no relation to interstate economic activity and even less of a connection to commerce than the gun in *Lopez* or the gender-motivated crime in *Morrison*. As noted above, these four species are limited to the California Central Valley and are not a commercial species. If Congress can regulate under the Commerce Clause wholly intrastate objects or activity that have nothing to do with commerce or any other economic enterprise, like the local fairy shrimp in this case, there is nothing that Congress is without power to regulate. Congress would be free to regulate "any action that might conceivably affect the number or continued existence of any item whatsoever." *Home Builders*, 130 F.3d at 1065 (Sentelle, J., dissenting).

A creative court can always find an ultimate "connection," no matter how attenuated, to some economic endeavor so as to putatively bring the object or activity under the Commerce Clause. For example, in *Home Builders*, Judge Henderson argued that the "take" provision of the ESA was directed not so much at the Delhi Sands Flower-loving Fly, but at its habitat. Therefore, she concluded, the development of such habitat would supply the necessary commerce link. By this reckoning, however, there is no stopping point to Congress' Commerce Clause power.

This tendency of the lower courts, like the D.C. Circuit in *Home Builders*, to stretch the Commerce Clause to the breaking point–because the listing and "take" provisions of the ESA do not satisfy the substantially affects test of *Lopez* and *Morrison*–warrants review by this Court.

Whether Congress can list an intrastate, noncommercial species, like the fairy shrimp in this case, as endangered or threatened under the ESA is an important question in need of resolution by this Court. Not only does the lower court decision conflict with Supreme Court precedent and blur the distinction between what is national and what is local, but the question will

surely be repeated. As Judge Wald observed in *Home Builders*: "Approximately 521 of the 1082 species in the United States currently designated as threatened or endangered are found in only one state." 130 F.3d at 1052.

To be sure, the answer to the listing question pits bedrock constitutional principles against the natural and laudable desire of Congress to protect the environment. But, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut" than the Constitution allows. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 416 (1922).

B. The Lack of a Clear Rationale in *National Association of Home Builders v. Babbitt*, to Resolve the Commerce Clause Question, Warrants a Writ of Certiorari in This Case

Not only does the split decision in *Home Builders* conflict with the decisions of this Court, but that case fails to provide any cogent rationale for upholding the ESA under the Commerce Clause. The majority judges simply could not agree on the basis for sustaining the "take" provision of the ESA as applied to the Delhi Sands Flower-loving Fly. In fact, they each expressly rejected the other's arguments. Therefore, the decision provides a dubious precedent for other courts.

In *Home Builders*, Judge Wald took the unique position that section 9, the "take" provision of the Endangered Species Act, was a proper exercise of Congress' Commerce Clause power over the "use of the channels of interstate commerce" because section 9 enables the government to control the transport of endangered species, and it keeps the channels of interstate commerce free from immoral and injurious uses. *Home Builders*, 130 F.3d at 1046. In direct conflict with *Lopez*, Judge Wald also upheld section 9 as a regulation of activity that substantially affects interstate commerce: "A class of activities can substantially affect interstate commerce regardless of

whether the activity at issue—in this case the taking of endangered species—is commercial or noncommercial." *Id.* at 1049.

Although Judge Henderson agreed with Judge Wald that section 9 was a proper exercise of Congress' Commerce Clause power, she expressly disagreed with Judge Wald's grounds for the decision; she openly rejected the "use of channels" argument:

> The Delhi Sands Flower-loving Flies the Department of the Interior seeks to protect are (along with many other species no doubt) entirely *intra*state creatures. They do not move among states either on their own or through human agency. As a result, like the Gun-Free School Zones Act in *Lopez*, the statutory protection of the flies "is not a regulation of the use of the channels of interstate commerce."

Id. at 1058 (emphasis in original).

Judge Henderson also rejected Judge Wald's speculative argument that the potential loss of medical or economic benefit from a protected species would have a substantial effect on interstate commerce: "I do not see how we can say that the protection of an endangered species has an effect on interstate commerce (much less a substantial one) by virtue of an uncertain potential medical or economic value." *Id.* at 1058.

Instead, Judge Henderson went in a different direction. She opined that the loss of biodiversity itself has a substantial effect on our ecosystem and, therefore, on interstate commerce. Finally, Judge Henderson changed the focus of the inquiry from the challenged regulation—section 9, which prohibits the "taking" of a threatened or endangered species—to the underlying land use. She ignored the Supreme Court's concerns expressed in *Lopez* that Congress may not use the Commerce

Clause to regulate areas of purely local concern and argued that the government is really regulating habitat. Thus, Judge Henderson concluded, the proposed development in this case (the intersection and hospital) "has an obvious connection with interstate commerce." *Id.* at 1059.

This disagreement between Judge Wald and Judge Henderson leaves the decision in *Home Builders* without a clear constitutional standard. No other court can point to this decision and cite a consistent rationale for evaluating Commerce Clause regulation under the Endangered Species Act. Yet other panels are considering the issue closed. This is significant because the D.C. Circuit is the primary venue for challenging ESA rules. This uncertainty is exacerbated by the fact that it was the dissent in *Home Builders* that was true to this Court's precedent.

Judge Sentelle applied the *Lopez* framework to section 9 and concluded in his dissent that the "take" prohibition could not constitutionally stand as applied to the Delhi Sands Flower-loving Fly. He observed that the "take" regulation does not control a commercial activity: "Neither killing flies nor controlling weeds nor digging holes is either inherently or fundamentally commercial in any sense." *Id.* at 1064. Like the statute struck down in *Lopez*, Judge Sentelle argued, the "take" provision "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.*

Judge Sentelle further argued that nothing in the "take" provision of the ESA or any other governing section requires that a regulated activity affect interstate commerce or provides a jurisdictional nexus as *Lopez* requires. *Id.* He concludes that the decision to uphold section 9 in this context would allow Congress to regulate under the Commerce Clause without any "logical stopping point." *Id.* at 1065.

A grant of review by this Court is, therefore, necessary to review the dubious precedent of the D.C. Circuit and to determine the reach of the Commerce Clause in species protection.

II

WHETHER AN AGENCY IS JUSTIFIED, UNDER THE APA AND ESA, IN REFUSING TO MAKE AVAILABLE FOR NOTICE AND COMMENT A SCIENTIFIC STUDY ON WHICH IT INDISPUTABLY PLACED "GREAT WEIGHT" AND WHICH IT TOUTED AS THE "BEST SCIENTIFIC AND COMMERCIAL DATA AVAILABLE" MERELY BECAUSE THAT STUDY BECAME AVAILABLE AFTER THE NOTICE OF PROPOSED RULE MAKING IS AN IMPORTANT QUESTION THAT INVOLVES A DIRECT CONFLICT BETWEEN TWO CIRCUITS

The listing of the fairy shrimp violated the procedural requirements of the ESA and the APA because a study of fairy shrimp populations on which the agency placed "great weight" and touted as the "best scientific and commercial data available" was not made available for review and comment by interested parties before the final listing determination. The lower court ruling to uphold the final listing determination, despite the failure to circulate the study, and in the face of Petitioners' claims that the study was inadequate to support the final listing determination, was both incorrect and in conflict with a decision of the Ninth Circuit.

When the United States Fish and Wildlife Service proposed listing five species of fairy shrimp, comments were submitted by Petitioners and others that questioned or contradicted the data on which the Service relied. As a result, the Service extended the date for a final decision to collect additional data in light of the "substantial disagreement regarding the sufficiency [and] accuracy of the available data

relevant" to listing the species. *See* 57 Fed. Reg. 19,856 (May 8, 1992) and 16 U.S.C. § 1533(b)(5)(B), App. E-6.

In direct response to comments on the proposed listing that the Service lacked comprehensive vernal pool sampling data, the Service relied, in the final rule, on a 1991-1993 field survey known as the "Simovich Study" that the Service had received during the comment period. The Service touted the study as the "best scientific and commercial data available" and, according to the district court, cited it extensively for "the important proposition that fairy shrimp are rare within their ranges." App. C-17. But the Service never circulated the study for public review and comment.

A. The Statutory Requirement

The Administrative Procedure Act provides that final agency action will be held unlawful and set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if the agency action was taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(A) and (D), App. D-1. The APA itself mandates that administrative action follow a procedure designed to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" and, after consideration of the matter, "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(b)-(c), App. D-1. This requirement was incorporated into the ESA by reference. *See* 16 U.S.C. § 1533(b)(4), App. E-6.

The purpose of this requirement is to provide for meaningful public participation in the rule-making process. *See Rybachek v. EPA*, 904 F.2d 1276, 1286 (9th Cir. 1990). But that purpose is defeated when, as in this case, a significant scientific study on which the final rule substantially relied (and challenged by Petitioners in this litigation) is not made available for comment so that interested persons, such as Petitioners here,

have an opportunity to submit "written data, views, or arguments" on information that indisputably formed a basis for the final rule.

Under the ESA, a determination to list a species as endangered or threatened must be based "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). This requirement heightens the need for notice and comment because without the benefit of such review, the agency could never know whether the data on which it relies is "the best scientific and commercial data available."

Also, in the ESA, Congress imposed additional procedural requirements on proposals to list beyond the notice and comment requirements mandated by the APA.

The ESA directs that at least 90 days before the effective date of the listing, that the Secretary must publish notice and the complete text of the proposed rule in the Federal Register, give actual notice to the state agency and the county in each state in which the species is believed to occur, and invite the comments of such agency thereon. 16 U.S.C. § 1533(b)(5)(A)(i)-(ii), App. E-6. Also, a summary of the proposed rule must be published in a newspaper in each area in which the species exists and a public hearing must be promptly held upon the request of any person. *Id.* § 1533(b)(5)(D), (E), App. E-6-7.

Thus, Congress afforded interested parties, including Petitioners, special procedural rights in the listing process. Not only did Congress incorporate the expansive rule-making requirements of the APA into the ESA, but that body expressly enlarged those requirements to increase public awareness and participation in the listing determination. But, in this case, the lower court did not recognize the added importance Congress placed on notice and comment. Instead, the court adopted a standard designed to lessen participation in the listing process by interested parties. A Writ of Certiorari should therefore be granted.

B. The Procedural Conflict

The lower court acknowledged that the Service "relie[d] heavily on the Simovich Study" and that the study was cited frequently in the final rule. App. B-7. The court even documented the significance of the study noting the Service's concession that the study was the most comprehensive study of California vernal pools ever attempted. *Id.*

Nevertheless, the lower court ruled that no public comment was necessary because the "Simovich Study" did "no more than provide support for the same decision [the Service] had proposed to take." App. B-8. But that cannot be the law. Under this standard, no new data need be circulated for public review and comment unless it changes the proposed decision. As the lower court put it:

> Essentially, the proposal advanced for comment a hypothesis and some supporting data. The Simovich study provided additional support for that hypothesis—indeed, better support than was previously available—but it did not reject or modify the hypothesis such that additional comment was necessary.

App. B-8.

This puts the cart before the horse. This standard presumes that a decision has been made at the proposal stage before the decision maker has even considered all the data. Unless and until the study is made available to test and refute and to compare and contrast to the other data, it cannot be known whether the study merely provides cumulative information or new insights that may undermine the original hypothesis. It's only the court's opinion that the "Simovich Study" supports the proposal to list. Petitioners believe otherwise. Among other things, the study area was too small to provide representative data. As the lower court would have it,

the Service could completely mischaracterize new data, arguing it supported the proposal, and immunize itself from both public and judicial review by sticking with its proposal.

Moreover, the standard adopted by the District of Columbia Circuit assumes the public stands in an adversarial role as against the agency and the only purpose for public review is to challenge the proposal. This is shortsighted because public review serves an important informational goal. As the district court in this case noted, the notice and comment requirement serves at least three purposes: (1) to ensure that agency regulations are tested by exposure to diverse public comment, (2) to ensure fairness and opportunity to be heard, and (3) to enhance judicial review. App. C-15. Clearly, the policies underlying the notice and comment requirement go beyond just testing the data. These policies suggest a need for an open and fair process, which Congress took pains to ensure with express language in the ESA that expands opportunity for public involvement in the listing decision. *See* 16 U.S.C. § 1533(b)(5), App. E-6. This requires, however, a stricter reading of the statutory mandate for meaningful public participation than the lower court was willing to give.

The decision below presents a question of exceptional importance because it raises the bar for triggering public notice and comment, encourages preconceived decision making, and precludes meaningful public participation in the rule-making process. Even the district court conceded that "the study should have been made available for notice and public comment," although the Court was reluctant to invalidate the final rule. Moreover, the decision below directly conflicts with *Idaho Farm Bureau Federation*, 58 F.3d at 1392, in which the Ninth Circuit held on nearly identical facts that the listing of an endangered species was defective because a scientific study, much like the "Simovich Study" in this case, was not circulated for public input.

In *Idaho Farm Bureau Federation*, the Service proposed listing the Bruneau Hot Springs Snail as an endangered species. The snail is a very small species that is found only in a narrow band of thermal springs in southwest Idaho. *Id.* at 1395. Like the fairy shrimp, the snail's habitat was reportedly at risk but little was known about the species. Two Senators wrote a letter to the Director of the Service expressing concerns that the listing would have "devastating effects" on the local agricultural community and suggested "listing would be meaningless to protection of the snail's natural habitat if the hydrologic cause of the habitat's decline is not fully understood." *Id.* at 1396. The Senators urged further analysis and offered to secure funding for hydrological studies. The Director agreed to the delay to allow the studies to be conducted. One study, relating to declining spring flows, was put in the hands of the Service only after the notice of the proposed listing. That study supported the decision to list the snail and was cited in the final rule. But, as in the present case, the study was not provided for public review and comment.

On review in the Ninth Circuit, the court held the final rule invalid under the APA and ESA because the Service made its listing decision "without observance of procedure required by law." *Id.* at 1404. The basis for that decision was threefold: (1) the study filled data gaps in the Service's claim that spring flows had decreased from historic levels; (2) the study provided unique data that was not duplicated in other reports; and (3) the necessity for notice and opportunity for comment on the study "was greatly heightened because FWS relied largely on the . . . study to support its final rule." *Id.* at 1403.

The Ninth Circuit could not have painted a clearer picture of the circumstances in the present case. As in *Idaho Farm Bureau Federation*, the Service received a letter from a member of Congress urging the Service to delay listing until further information on species population could be gathered.

> Many commenters, including the California Department of Transportation and Congressman Wally Herger, requested the Service delay or not list the five species because they believed additional distributional and ecological data are needed to determine the "true" status of these animals.

59 Fed. Reg. at 48,141.

Also, other commenters stated the survey work on which the proposed rule was based was deficient and that this lack of information "would result in a procedurally inadequate listing." *Id.* Still others pointed out that the Service had not conducted a random field survey and failed to correctly delineate the distribution of the fairy shrimp. *Id.* "To support the need for further field work, one commenter cited 18 records of the vernal pool fairy shrimp and 30 records of the California linderiella that were not included in this proposed rule." *Id.*

In direct response to these many objections, the Service cited the "Simovich Study" that was not available for public review and comment before the final listing. For the first time, after the close of the comment period, the Service pointed to what it characterized as a "credible" random field survey of fairy shrimp distribution: "Scientifically credible data on the status of the five crustaceans was collected in a random 322 kilometer (200 mile) north-south transect in the Sacramento Valley from Fall River in Shasta County to Jepson Prairie in Solano County (Simovich *et al.* 1992)." *Id.*

Although critically deficient, the "Simovich Study" was put forward by the Service as the most complete study of California vernal pools to date. It did more, therefore, than merely supplement or confirm existing data. Like the hydrological study in *Idaho Farm Bureau Federation*, the "Simovich Study" filled gaps in the Service's claim that the fairy shrimp were either endangered or threatened and must be listed. According to the district court, the Service cited the "Simovich

Study" extensively for "the important proposition that fairy shrimp are rare within their ranges." App. C-17.

The "Simovich Study" also provided unique data that was not duplicated in other reports:

> The Service concedes that the study is "the first long-term multidisciplinary study" and "the most scientifically based and well-documented professional study" of California vernal pools ever attempted, [and] that it is "more comprehensive than any previous study."

App. B-7.

Additionally, the Service conceded and the lower court found that "the final rule relied substantially on the findings in the Simovich Study." *Id.* The "Simovich Study," therefore, met the three-fold criteria established by the Ninth Circuit for invoking public notice and comment under the APA and ESA; the study filled data gaps, provided unique information, and the Service relied largely on the study to support its final rule.

But the Ninth Circuit notice and comment standard directly conflicts with the standard adopted by the D.C. Circuit. Whereas in the D.C. Circuit the "Simovich Study," and data like it, need not to be made available for public review because it does "no more than provide support for the same decision [the Service] had proposed to take," in the Ninth Circuit such data would have been circulated for public comment for the reasons just described.

There are other differences between these decisions as well. The Ninth Circuit also declared in *Idaho Farm Bureau Federation* that "[o]pportunity for public comment is particularly crucial when the accuracy of important material in the record is in question." *Idaho Farm Bureau Federation*, 58 F.3d at 1403. Such is the case here. Petitioners have challenged the accuracy and adequacy of the "Simovich Study"

in the course of this litigation. For example, Petitioners question the purported randomness of the study noting the vernal pool survey was limited to only 14 sites along a 22-mile transect of the Central Valley whereas the Service relied on this data to conclude the fairy shrimp are at risk of extinction throughout their entire range. *See* Opening Brief for Appellants in the court below at 20-21. Quite simply, the Study is unreliable and does not support the Service's conclusions.

Adding to the crucial need for meaningful comment by interested parties is the fact that the "Simovich Study" did not undergo formal peer review and the ESA mandates that a listing determination rest "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A), App. E-3. The Panel took that provision to mean that the Service has no affirmative duty to fill in the informational gaps on the status of the fairy shrimp but may rely entirely on existing data, or the lack thereof:

> Assuming that studies the Service relied on were imperfect, that alone is insufficient to undermine those authorities' status as the "best scientific . . . data available." Appellants misread § 1533(b)(1)(A): the Service must utilize the "best scientific . . . data *available*," not the best scientific data *possible*.

App. B-9 (emphasis in original).

The problem with this interpretation is that it can't be known whether the data is the best available until it has been reviewed. This interpretation also encourages ignorant rule making and authorizes the listing of a species as endangered or threatened with little or no data. But the listing of a species has immense repercussions in the affected communities. For example, Petitioners in this case have been required to hold up or cancel development projects worth millions of dollars. But they are not alone. The plight of hundreds of farm families in

Oregon and California have been widely published. Close to 1400 farm families have been denied virtually all of their contractual irrigation water from the Klamath Project this year in favor of listed fish. As a result, many are likely to lose their livelihood. *See* Eric Brazil, *Farmers Protest Loss of Water*, S.F. Chron., May 8, 2001, at A3. Surely, the public interest and procedural mandates of the law are best served by providing the public a meaningful opportunity to review and comment on significant information that forms the basis for a listing determination—an opportunity denied Petitioners in this case.

The importance of public notice and comment recognized by the Ninth Circuit in *Idaho Farm Bureau Federation* cannot be reconciled with the limited role allowed Petitioners and other interested persons by the lower court in this case. That conflict raises a question of national importance that requires resolution by this Court.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari.

DATED: October, 2001.

Respectfully submitted,

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United States Court of Appeals
for the District of Columbia

No. 00-5143

September Term, 2000
95cv00726
Filed On: July 13, 2001

Building Industry Association
of Superior California, et al.,
Appellants

v.

Gale A. Norton, Secretary
of the Interior, et al.,

Appellees.

BEFORE: Edwards, Chief Judge; Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges.

ORDER

Upon consideration of petitioners' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

By: /s/ Robert A. Bonner
Deputy Clerk

Appendix B–1

LEXSEE 247 F.3d 1241

BUILDING INDUSTRY ASSOCIATION OF SUPERIOR CALIFORNIA, ET AL., APPELLANTS v. GALE A. NORTON, SECRETARY OF THE INTERIOR, ET AL., APPELLEES

No. 00-5143

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

247 F.3d 1241; *2001 U.S. App. LEXIS 8513; 52 ERC (BNA) 1257*

April 9, 2001, Argued

May 8, 2001, Decided

PRIOR HISTORY:

[**1] Appeal from the United States District Court for the District of Columbia. (95cv0726).

DISPOSITION:

Affirmed.

COUNSEL:

Lawrence R. Liebesman argued the cause for appellants. With him on the briefs was Rafe Petersen.

Elizabeth Ann Peterson, Attorney, United States Department of Justice, argued the cause for the federal appellees. With her on the brief were John Cruden, Deputy Assistant Attorney General, and Ellen J. Durkee, Attorney.

Neil Levine argued the cause and filed the brief for the non-federal appellees.

Robin L. Rivett and Anne M. Hayes were on the brief for amici curiae Pacific Legal Foundation, et al., in support of appellants. Reed Hopper entered an appearance.

JUDGES:

Before: SENTELLE and HENDERSON, Circuit Judges, and SILBERMAN, Senior Circuit Judge. Opinion for the Court filed by Senior Circuit Judge SILBERMAN.

OPINION BY:

SILBERMAN

OPINION:

[*1243] SILBERMAN, *Senior Circuit Judge*: Appellants Building Industry Association, et al., sought review of the Fish and Wildlife Service's listing of various fairy shrimp species as endangered or threatened. They now challenge a district court decision denying their motion for summary judgment. Determining that we have jurisdiction, we affirm **[**2]** the denial.

I.

In those regions of California with Mediterranean climates, one finds shallow depressions called "vernal pools" that fill with rainwater in fall and winter only to evaporate in spring. In these pools reside numerous indigenous aquatic invertebrates that have evolved to survive in the pools' variable environmental conditions. In 1992 the Fish and Wildlife Service proposed to list as endangered species five tiny crustaceans resident in California's vernal pools: the vernal pool fairy shrimp, Conservancy fairy shrimp, longhorn fairy shrimp, California linderiella, and vernal pool tadpole shrimp (collectively, "fairy shrimp"). The proposed rule specified

actual and threatened destruction of vernal pools as a justification for the listing.[1]

After a comment period, the Service withdrew the proposal to list the California linderiella. It listed vernal pool fairy **[**3]** shrimp as threatened and the three remaining species as endangered. Though the Endangered Species Act (ESA) requires the Service to designate "critical habitats" for listed species "to the maximum extent prudent and determinable," the Service declined to make designations on the ground that so doing would put the listed species at risk of vandalism.[2]

The Service's decision then began its long and bumpy journey to appellate review. Appellants challenged the listing decision in the district court, asserting violations of the ESA, the Administrative Procedure Act (APA), and the Constitution. Along with contesting on various grounds the general validity of the listing decision, appellants took issue with the Service's failure to **[**4]** designate critical habitats. In response to cross-motions for summary judgment, the district court in July 1997 granted summary judgment to the Service on all claims except the critical habitat claim. On that claim, the court held that the failure to designate critical habitat was arbitrary and capricious and remanded to the Service either for designation or for explanation why designation was not prudent.[3]

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[1] *See Proposal to Determine Endangered Status for Fairy Shrimp*, 57 Fed. Reg. 19,856, 19,858 (proposed May 8, 1992).

[2] 16 U.S.C. § 1533(a)(3) (2000); *see Determination of Endangered Status for Fairy Shrimp*, 59 Fed. Reg. 48,136, 48,151 (Sept. 19, 1994); *Withdrawal of Proposal as to the California Linderiella*, 59 Fed. Reg. 48,154 (Sept. 19, 1994).

[3] *See Bldg. Indus. Ass'n v. Babbitt*, 979 F. Supp. 893, 905-06, 908 (D.D.C. 1997).

While the critical habitat remand was pending, the district court certified the listing claims under Rule 54(b). An appeal of that portion of the decision followed, but we dismissed for lack of jurisdiction. The listing claims and the critical habitat claim arose out of the same body of law and fact, meaning that the listing appeal would be intertwined with a possible critical habitat appeal. With the threat of such a piecemeal appeal looming, and without an explanation **[*1244]** from the district court as to why **[**5]** such an approach was desirable, we held that we lacked jurisdiction.[4] In March 1999, the district court reviewed additional record citations the Service had provided in support of its conclusion that critical habitat designations would be imprudent. It ruled that these materials did not adequately support the Service's conclusion, vacated the Service's decision not to designate critical habitats, and remanded once again. According to the district court, the decision constituted a final judgment on all claims.

Appellants brought a second appeal of the listing decision. We ordered the parties to address whether a final decision existed because the critical habitat remand was still before the Service, which had not itself appealed. In an attempt to resolve any possible jurisdictional infirmity, appellants decided to abandon litigation of the critical habitat claim, leaving for resolution only the listing **[**6]** claims, which were clearly final. To that end, appellants moved the district court to amend its March 1999 judgment remanding to the Service or in the alternative for leave to amend their complaint to delete the critical habitat claim. The district court determined that due to the pending appeal it had no jurisdiction to consider the motion; it also indicated that if it were to regain jurisdiction, it would deny the motion to amend the judgment but grant leave to

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[4] *See Bldg. Indus. Ass'n v. Babbitt*, 333 U.S. App. D.C. 190, 161 F.3d 740 (D.C. Cir. 1998).

amend the complaint.[5] Soon thereafter appellants moved this court to dismiss their appeal, which we did. The district court then granted appellants' motion to strike from their complaint the critical habitat claim, the only claim on which they had prevailed. Appellants immediately brought this appeal, their third attempt to gain review of the district court's dismissal of the listing claims. We once again ordered the parties to address our jurisdiction.

II. [7]**

Appellants allege numerous errors in the district court's decision. They argue that the rule's heavy reliance on a study, the so-called "Simovich study," not made available during the comment period violated the APA, as did the rule's enumeration of fairy shrimp populations in terms of vernal pool complexes rather than individual pools. They further contend that the listing was not supported by the best available scientific data, as required by the ESA, and that the Service misapplied its own policy on independent peer review. The nonfederal appellees, public interest groups that intervened below ("intervenors"), argue that we lack jurisdiction because no final judgment exists. We address that argument before reaching the merits.

A.

Intervenors' jurisdictional argument is subtle. Absent appeal by the agency, an order remanding to an agency for further proceedings is not an appealable final decision even where the district court dismisses the case. *See NAACP v. United States Sugar Corp.*, 318 U.S. App. D.C. 58, 84 F.3d 1432, 1436 (D.C. Cir. 1996). Before amendment of the complaint, therefore, the critical habitat remand pending before the Service prevented our **[**8]** assertion of appellate jurisdiction over the listing claims. Accordingly, appellants amended their complaint to omit the critical habitat claim. Though the 1997 decision was not final

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[5] *See Bldg. Indus. Ass'n v. Babbitt*, 70 F. Supp. 2d 1 (D.D.C. 1999).

at the time it was entered, under the doctrine of cumulative finality the dismissal of the only claim **[*1245]** that survived that decision retroactively rendered it final and appealable. *See* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3914.9, at 631-42 (2d ed. 1992); *cf. Sacks v. Rothberg*, 269 U.S. App. D.C. 353, 845 F.2d 1098, 1099 (D.C. Cir. 1988) (per curiam).

Intervenors argue, however, that the district court abused its discretion in allowing amendment of the complaint after judgment. If that were so, the March 1999 decision remanding to the Service would still be in force, and there would be no final judgment for this court to review. Ordinarily post-judgment amendment of a complaint under Rule 15(a) requires reopening of the judgment pursuant to Rule 59(e) or 60(b). *See Cassell v. Michaux*, 99 U.S. App. D.C. 375, 240 F.2d 406, 407-08 (D.C. Cir. 1956). This prevents litigants from resurrecting claims on which they have **[**9]** lost. *Cf. Firestone v. Firestone*, 316 U.S. App. D.C. 152, 76 F.3d 1205, 1207-08 (D.C. Cir. 1996) (per curiam). But that concern is absent here: appellants prevailed on the claim in question, and dropped it only so that they might appeal dismissal of other claims.

Appellants respond (and the Service agrees) that because the remand was not a *final* judgment, no motion under Rule 59 or 60 was necessary to amend the complaint to abandon claims they no longer wished to pursue. We agree. The general requirement of a Rule 59 or 60 motion prior to post-judgment amendment is employed to serve the judicial policy "favoring finality of judgments and the expeditious termination of litigation." *See* 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1489, at 694 (2d ed. 1990). Neither goal is served by requiring a Rule 59 or 60 motion here. Indeed, it would be passing strange if in order to secure appeal of the claims on which they lost appellants were forced to litigate to finality claims on

which they preliminarily prevailed and that they now wish to abandon.[6] **[**10]**

B.

As noted, the rule relies heavily on the Simovich study, which was released after the proposal and which the agency received only during the comment period. The study was therefore not among the materials published for public comment. Appellants argue that the Service's failure to seek comment on the study violated the APA.

It is not disputed that the Service placed great weight on the Simovich study. It is cited frequently in the rule, which touted it as "scientifically credible." 59 Fed. Reg. at 48,141. The Service concedes that the study is "the first long-term multidisciplinary study" and "the most scientifically based and well-documented professional study" of California vernal pools ever attempted, that it is "more comprehensive than any previous study," and that "the final rule relied substantially on the findings in the Simovich study."

The Service nonetheless contends that it was not required to publish the Simovich study for public comment, and we agree. The APA generally obliges **[*1246]** an agency to publish for comment the technical studies and data on which it relies. *See Solite Corp. v. EPA*, 293 U.S. App. D.C. 117, 952 F.2d 473,

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[6] Intervenors argue that they are prejudiced by appellants' amendment because they are forced to relitigate the dropped claim in a separate suit. But the inability of a third party to rely on the disposition of a claim cannot force a plaintiff to litigate what it wishes to drop. In any event, one intervenor recently sued the Service to compel designation of critical habitats for the four listed species. The district court has granted summary judgment to that intervenor and ordered the Service to designate critical habitats by August 8, 2001. *See Butte Envtl. Council v. White*, No. Civ. S-00-0797 WBS GGH (E.D. Cal. Feb. 8, 2001).

484 (D.C. Cir. 1991) [**11] (per curiam). But to avoid "perpetual cycles of new notice and comment periods," *Ass'n of Battery Recyclers v. EPA*, 341 U.S. App. D.C. 78, 208 F.3d 1047, 1058 (D.C. Cir. 2000), a final rule that is a logical outgrowth of the proposal does not require an additional round of notice and comment even if the final rule relies on data submitted during the comment period. *See Int'l Fabricare Inst. v. EPA*, 297 U.S. App. D.C. 331, 972 F.2d 384, 399 (D.C. Cir. 1992) (per curiam); *Solite*, 952 F.2d at 484. Such is the case here. The Simovich study, while the best available, only confirmed the findings delineated in the proposal. In relying on it, the Service "did no more than provide support for the same decision it had proposed to take." *Int'l Fabricare*, 972 F.2d at 399. Essentially, the proposal advanced for comment a hypothesis and some supporting data. The Simovich study provided additional support for that hypothesis–indeed, better support than was previously available–but it did not reject or modify the hypothesis such that additional comment was necessary. *See Solite*, 952 F.2d at 484.

Appellants next [**12] object to the rule because it counts fairy shrimp populations by the number of vernal pool complexes, not the number of individual vernal pools, in which they reside. *See* 59 Fed. Reg. at 48,137. (A pool complex is a group of individual pools that, due to their proximity, are susceptible to the same threats.) Appellants insist that the proposal never put the public on notice of the "complexes methodology" or of the definition of complexes.[7]

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[7] Appellants' brief never explains why they were disadvantaged by the Service's reliance on pool complexes. At oral argument appellants suggested that reliance on complexes reduced the number of discrete groups of fairy shrimp, meaning that a threat to a single shrimp grouping threatens a greater fraction of that species. Their argument remains somewhat obscure.

But the use of complexes to measure fairy shrimp populations was no surprise: the proposal itself used the term five times. *See* 57 Fed. Reg. at 19,856, 19,858, 19,859. Moreover, nothing in the final rule's use of complexes constituted a deviation from the proposed rule. The proposal posited danger to existing fairy shrimp populations, which were discussed in terms of both individual pools and pool complexes; consistent with the proposal, the final rule found danger to existing fairy shrimp populations, which were measured—most accurately, according to the rule—in terms of pool complexes. The final rule's measurement of populations solely in terms of complexes, after the proposal's uncommitted use of both methodologies, **[**13]** was a tightening of the rule's reasoning, but it was nonetheless a logical outgrowth of the proposal. Appellants have not pointed to any way in which the sharpened focus on complexes changed the rule's reasoning or conclusion.

Appellants also claim that methodological flaws in the Simovich study and other relied-upon authorities mean that the rule was not based on the "best scientific and commercial data available," as required by 16 U.S.C. § 1533(b)(1)(A). Yet as the district court noted, appellants "have pointed to no data that was omitted from consideration." 979 F. Supp. at 903. Assuming that studies the Service **[**14]** relied on were imperfect, that alone is insufficient to undermine those authorities' status as the "best scientific . . . data available." Appellants misread § 1533(b)(1)(A): the Service must utilize the "best scientific . . . data *available*," not the best scientific data *possible*. The Service **[*1247]** may not base its listings on speculation or surmise or disregard superior data, *cf. Bennett v. Spear*, 520 U.S. 154, 176, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997); *City of Las Vegas v. Lujan*, 282 U.S. App. D.C. 57, 891 F.2d 927, 933 (D.C. Cir. 1989), but absent superior data—and appellants point to none—occasional imperfections do not violate § 1533(b)(1)(A).

Finally, we reject appellants' claim that the listing's validity is undermined by its failure to comply with the Service's peer review policy. To be sure, the listing was not subjected to the *present* peer review procedure, which requires that "during the comment period" the Service obtain three independent specialists' opinions on the merits of the decision and reprint them in the listing. *See* Peer Review Policy Statement, 59 Fed. Reg. 34,270 (July 1, 1994). But the current **[**15]** peer review policy came into force 22 months after the close of the fairy shrimp comment period. Appellants point out that a March 1995 letter from a Service official to Congressman Richard Pombo stated that "in conformance with policy (59 FR 34270), the Service sought scientific peer review of the listing proposal." Letter from George T. Frampton, Jr., Assistant Secretary for the Service, to Hon. Richard Pombo 1 (March 10, 1995). That statement may have misled the congressman as to the Service's compliance with the specific peer review procedures promulgated in 1994, but the listing was in fact subject to peer review that was intense though less formal than is currently required. In any event, appellants suggest no basis on which the letter would render the later-enacted policy statement retroactively binding on an already-concluded comment period.[8]

[16]**

* * *

The denial of appellants' motion for summary judgment is

Affirmed.

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[8] Appellants also argue that this application of the ESA exceeds Congress' Commerce Clause power and that the Service misapplied the ESA's statutory factors. According to appellants' brief, however, the former claim fails under *National Assoc. of Home Builders v. Babbitt*, 327 U.S. App. D.C. 248, 130 F.3d 1041 (D.C. Cir. 1997), and is asserted only to preserve the possibility of en banc review. Appellants conceded at oral argument that the latter claim was not pressed below.

Appendix C–1

No.

BUILDING INDUSTRY ASSOCIATION OF SUPERIOR CALIFORNIA, et al., Plaintiffs,

v.

BRUCE BABBITT, et al., Defendants,

ENVIRONMENTAL DEFENSE CENTER and BUTTE ENVIRONMENTAL COUNCIL, Defendant-Intervenors.

Civil Action No. 95-0726 (PLF)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

979 F. Supp. 893; 1997 U.S. Dist. LEXIS 14768
July 25, 1997, Decided
July 25, 1997, Filed

DISPOSITION:

[**1] Plaintiffs' motion for summary judgment GRANTED in part and DENIED in part. Portion of the Secretary's decision REMANDED to the Fish and Wildlife Service. Defendants' motion for summary judgment GRANTED in part and DENIED in part. JUDGMENT entered for defendants; and defendant-intervenors' motion for summary judgment GRANTED in part and DENIED in part. JUDGMENT entered for defendant- intervenors.

COUNSEL:

For Plaintiffs: Lawrence R. Lilebesman, Linowes & Blocher, LLP, Silver Spring, MD.

For Defendants: Lyn Jacobs, Department of Justice, Washington, DC.

For Defendant/Intervenors: Anne Spielberg, Harmon, Curran & Spielberg, Washington, DC.

For Defendant/Intervenors: Marc Chytilo, Environmental Defense Center, Santa Barbara, CA.

For Defendant/Intervenors: Neil Levine, University of Denver, Denver, CO.

For Amici: Robin L. Rivett, Mark T. Gallagher, Sacramento, CA.

JUDGES:

PAUL L. FRIEDMAN, United States District Judge.

OPINION BY:

PAUL L. FRIEDMAN

OPINION:

[*896] OPINION

I. BACKGROUND

"Fairy shrimp" are tiny crustaceans found primarily, although not exclusively, in California's Central Valley region. Named for their delicate elongated bodies and wing-like thrashing legs, **[**2]** fairy shrimp are endemic to "vernal pools," sometimes known as seasonal wetlands, which are seasonally wet, isolated water bodies that pond in the winter and spring and evaporate during the summer. Fairy shrimp, the collective term for several similar shrimp species, constitute an important link in the vernal pool ecosystem, providing food for other animals and maintaining various aspects of the vernal

pool ecological balance.[1] As a general matter, vernal pool habitat stretches from southern Oregon down the west coast into Baja California, although fairy shrimp are not found throughout this region. Final Rule, 59 Fed. Reg. at 48136. Since vernal pools occur throughout the farmlands of the Central Valley as well as in other areas of heavy agricultural and urban economic development, much of the fairy shrimp's habitat has been destroyed over the years, and it continues to disappear at a rate of about two to three percent per year. *Id.* at 48137. **[**3]**

The fate of these little creatures and their hotly contested habitat drives the instant case. On September 19, 1994, the Fish and Wildlife Service ("FWS") of the United States Department of the Interior exercised its authority under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, *et seq.*, to list as endangered three different species of fairy shrimp—the Conservancy fairy shrimp (Branchinecta conservatio), the longhorn fairy shrimp (Branchinect longiantenna) and the vernal pool tadpole shrimp (Lepidurus packardi)—and to list as threatened one species of fairy shrimp—the vernal pool fairy shrimp (Branchinecta lynchi). Final Rule, 59 Fed. Reg. 48136 (Sept. 19, 1994).[2] The **[*897]** FWS based its listing decision on its findings that fairy shrimp habitat has been and continues to be destroyed, that a number of specific planned development projects would further eliminate known vernal pool complexes,

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[1] Final Rule: Determination of Endangered Status for the Conservancy Fairy Shrimp, Longhorn Fairy Shrimp, and the Vernal Pool Tadpole Shrimp; and Threatened Status for the Vernal Pool Fairy Shrimp ("Final Rule"), 59 Fed. Reg. 48136, 48137 (Sept. 19, 1994), Administrative Record ("A.R.") at 186.

[2] In its Final Rule, the FWS also withdrew the California linderiella (Linderiella occidentalis), a species of fairy shrimp that initially had been proposed for listing in the Proposed Rule. Final Rule, 59 Fed. Reg. at 48136.

and that fairy shrimp are scarce within their remaining habitat. *Id.* at 48147-51. **[**4]**

Plaintiffs challenge the listing of these four species of fairy shrimp, arguing that the listings violate the ESA, the Administrative Procedure Act, 5 U.S.C. §§ 501, *et seq.*, and the Fifth Amendment, the Tenth Amendment and the Commerce Clause of the United States Constitution.[3] Defendants and defendant-intervenors maintain that the listings are well supported by law and the best available science, and that in any event plaintiffs lack standing to challenge the listings because their interests do not fall within the zone of interests that Congress intended to protect with the ESA. The case is before the Court on cross-motions for summary judgment. **[**5]**

II. STATUTORY FRAMEWORK

An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A "threatened species" is "any

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[3] Plaintiffs are the Building Industry Association of Superior California ("BIA"), a nonprofit corporation representing approximately 625 businesses in the California construction industry and their employees; Marvin L. Oates, a real estate developer from Sacramento, California and a member of the BIA; Sacramento County, California; the Sacramento Metropolitan Chamber of Commerce; and the Rescue Union School District, California. Defendants are the United States Department of the Interior; Bruce Babbitt, Secretary of the Interior; the Fish and Wildlife Service; and Molly Beattie, Director of the FWS. Secretary Babbitt and Director Beattie are sued in their official capacities only.

Intervening on behalf of defendants are the Environmental Defense Center and the Butte Environmental Council. The following organizations and governmental entities jointly filed an amicus brief in support of plaintiffs: the Pacific Legal Foundation; the California Farm Bureau Federation; the California Cattlemen's Association; El Dorado County, California; and Placer County, California.

species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20). "To the maximum extent practicable," within 90 days after receiving a petition of an interested person to list a species, the Secretary of the Department of the Interior shall make a finding whether the listing may be warranted. 16 U.S.C. § 1533(b)(3)(A). If the listing may be warranted, within 12 months of receiving the petition the Secretary shall make a determination either that the petitioned action is not warranted, warranted, or warranted but precluded. 16 U.S.C. § 1533(b)(3)(B).[4] In so doing, the Secretary, through the FWS,

> shall . . . determine whether any species is an endangered species or a threatened species because of any of the following factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, **[**6]** or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1). The Secretary shall make such determinations "solely on the basis of the best scientific and commercial data available . . . ." 16 U.S.C. § 1533(b)(1)(A).

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[4] The Secretary may determine that an action is "warranted but precluded" where "the immediate proposal and timely promulgation of a final regulation implementing the petitioned action . . . is precluded by pending proposals to determine whether any species is an endangered species or a threatened species" and "expeditious progress is being made to add qualified species to either of the lists published under subsection (c) of this section and to remove from such lists species for which the protections of this chapter are no longer necessary." 16 U.S.C. § 1533(b)(3)(B)(iii).

On November 19, 1990, Roxanne Bittman petitioned the FWS to list the Conservancy **[**7]** fairy shrimp, the longhorn fairy shrimp, the vernal pool fairy shrimp, and the California linderiella as endangered species. On April 28, 1991, Dee Warenycia petitioned the FWS to list the vernal pool tadpole shrimp as endangered. The FWS found that the petitions "may be warranted," 56 Fed. Reg. 426968 (Aug. 30, 1991), and published a Proposed Rule proposing to list the five species as endangered. 57 Fed. Reg. 19856 (May 8, 1992), A.R. at 480. An initial public comment **[*898]** period lasted from May 8 through July 7, 1992, and a public hearing was held on August 31, 1992. The public comment period was reopened and extended until September 18, 1992. 57 Fed. Reg. 36380 (Aug. 13, 1992). On September 18, 1992, Representative Vic Fazio organized a public meeting in Red Bluff, California, which representatives of the FWS also attended. By the end of the public notice and comment period, the FWS had received 117 comments from public and private parties including, inter alia, the California Department of Parks and Recreation, the California Department of Fish and Game, and 41 private parties, all supporting the listing; it received comments from 34 private parties (including Sugnet and Associates, **[**8]** a consultant retained by plaintiff BIA), and two Congresspersons opposing the listing. 59 Fed. Reg. at 48139.

On February 9, 1994, conservation groups brought suit to compel the Secretary to list the fairy shrimp species as endangered. *Environmental Defense Center v. Babbitt*, Case No. 94-0788, Complaint (N.D. Cal. Feb. 9, 1994), A.R. at 19. In compliance with an agreement reached in settlement of that suit, the FWS published its Final Rule on September 19, 1994. *See* A.R. at 185. The FWS determined that three fairy shrimp species were endangered—the Conservancy fairy shrimp, the longhorn fairy shrimp and the vernal pool tadpole shrimp—and that one species, the vernal pool fairy shrimp, was threatened. It based its determination primarily on the present and

threatened destruction, modification and curtailment of the fairy shrimp's habitat and range, the inadequacy of existing regulatory mechanisms, and other natural and man-made factors. 59 Fed. Reg. at 48147-50; *see* 16 U.S.C. § 1533(a)(1).

III. STANDARD OF REVIEW

Judicial review of agency decisions under the ESA is governed by Section 706 of the APA. 5 U.S.C. § 706; *see City of Las Vegas v. Lujan*, 282 U.S. **[**9]** App. D.C. 57, 891 F.2d 927, 932 (D.C. Cir. 1989). Agency actions may be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Supreme Court has described the principles governing review as follows:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made. . . . The reviewing court . . . may not supply a reasoned basis for the agency's action that the agency itself has not given. [The court] will, however, uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.

Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983) (internal quotations and citations omitted). Review is based on the entire administrative record. *Camp v. Pitts*, 411 U.S. 138, 142, 36 L. Ed. 2d 106, 93 S. Ct. 1241 (1973); *see San* **[**10]** *Luis Obispo Mothers For Peace v. Nuclear Regulatory Commission*, 243 U.S. App. D.C. 68, 751 F.2d 1287, 1325-26

(D.C. Cir 1984).[5] Although the Court may not substitute its judgment for that of the agency, *Marsh v. Oregon Natural Resources Defense Council*, 490 U.S. 360, 378, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989), the Court's review must nevertheless be "searching and careful." *Id.*

In this case, much of the dispute revolves around the defendants' scientific conclusions about the state of the fairy shrimp species. The Supreme Court has made clear that under such circumstances where a determination "requires a high level of technical expertise, [a court] must defer to the informed discretion of the responsible federal agencies." *Marsh v. Oregon Natural Resources Defense Council*, 490 U.S. at 377; *see Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 **[**11]** U.S. 87, 103, 76 L. Ed. 2d 437, 103 S. Ct. 2246 (1983) ("When examining this kind of scientific determination . . . a reviewing **[*899]** court must generally be at its most deferential."). In the same vein, "when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Resources Defense Council*, 490 U.S. at 378.

IV. PLAINTIFFS' STANDING

Defendants and defendant-intervenors argue that plaintiffs lack Article III standing because they have failed to articulate injury in fact. Defendant-intervenors also argue that plaintiffs lack standing under the ESA and under the APA because they have asserted no interest in protecting the fairy shrimp and therefore do not fall under the "zone of interests" protected by Congress in passing the ESA. The Court concludes that plaintiffs have standing under both tests.

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[5] By Memorandum Opinion and Order of October 30, 1995, the Court granted in part plaintiffs' motion to supplement the administrative record.

A. Article III Standing

In order to withstand defendants' and defendant-intervenors' suggestion that they lack standing, plaintiffs must demonstrate that they have suffered "injury in fact," that is, injury **[**12]** "fairly traceable" to the actions of defendants and that the injury will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992); *Navegar, Inc. v. United States*, 322 U.S. App. D.C. 288, 103 F.3d 994, 997-98 (D.C. Cir. 1997). Plaintiffs have provided evidence that the listing of the fairy shrimp has depressed their land values and development prospects, has halted or impeded specific developments, and has already cost them thousands of dollars for sampling surveys as well as the costs of delay. *See Declaration of Robert Shattuck*, PP 5, 7 (Jan. 27, 1996); Declaration of Larry D. Kelley PP 3-12 (Jan. 27, 1996); Declaration of Randy Schaber PP 5-9 (Jan. 26, 1996); Affidavit of Robert Ryan PP 4-6 (Dec. 15, 1995); Declaration of Lorraine Garcy PP 4-12 (Jan. 11, 1996), Pls.' Opposition to Defs.' Motions for Summary Judgment, Exs. A-E.

Defendant-intervenors argue that plaintiffs' injuries are not "fairly traceable" to the listing decision but rather that their injuries will be caused in the future, if at all, by yet-to-be-published regulations promulgated pursuant to the listing. The Supreme Court **[**13]** has recently made clear, however, that the "fairly traceable" requirement does not mean that plaintiffs must show that the listing was "the very last step in the chain of causation." *Bennett v. Spear*, 137 L. Ed. 2d 281, 117 S. Ct. 1154, 1164 (1997). Rather, plaintiffs can meet their burden by demonstrating that the listing had a "determinative or coercive effect on the action of someone else" who, in turn, caused plaintiffs injury. *Id.* In this case, the listing has already had significant effects on the Army Corps of Engineers and the various regulatory entities that govern land use in California, which in turn, as the affidavits and declarations demonstrate,

have forced plaintiffs to incur costs and delays. Plaintiffs therefore have standing under Article III to challenge the listing.

B. Prudential Standing

Under the APA and some parts of the ESA, a plaintiff must meet both Article III standing requirements and prudential standing requirements. Prudential standing is a "judicially self-imposed limit[] on the exercise of federal jurisdiction," *Bennett v. Spear*, 117 S. Ct. at 1161, and it "applies unless it is expressly negated." *Id.* at 1162 (holding that the **[**14]** citizen-suit provision of the ESA, which permits suits by "any person," expands the zone-of-interests for certain claims); *see State of Idaho v. ICC*, 308 U.S. App. D.C. 268, 35 F.3d 585, 592 (D.C. Cir. 1994). One of the requirements of prudential standing is "that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett v. Spear*, 117 S. Ct. at 1161 (citing *Allen v. Wright*, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984)).

Plaintiffs argue that the Supreme Court's recent decision in *Bennett v. Spear* removes any doubt as to their prudential standing. The Court agrees. In *Bennett v. Spear*, the Supreme Court held that irrigation districts that used water from the Klamath Irrigation Project had prudential standing both under the ESA and the APA **[*900]** to challenge a Biological Opinion issued by the FWS that arguably would have reduced the amount of water available for plaintiffs' use. The Court reversed the Ninth Circuit's decision that the plaintiffs lacked standing because their admittedly economic interests did not fall within the zone of **[**15]** preservationist and environmental interests protected by the ESA.

The Court first held that the citizen-suit provision of the ESA, which authorizes suit by "any person," negates the zone-of-interests test altogether because it manifests a clear

congressional intent to permit anyone to sue, no matter the nature of their interest. *Bennett v. Spear*, 117 S. Ct. at 1162. In other words, an affected interested business that thinks that the FWS has gone too far in seeking to protect and preserve the environment may be a "person" under the ESA on equal footing with a preservationist or environmentalist who challenges an FWS decision not to preserve or conserve the environment sufficiently.

The Court also recognized in *Bennett v. Spear*, however, that not all suits can be brought under the citizen-suit provision of the ESA; suits (such as the instant action) to compel the Secretary to perform his statutory responsibilities under the ESA, for example, are cognizable only under the APA. *Bennett v. Spear*, 117 S. Ct. at 1167. The Court held that such APA plaintiffs are indeed subject to the zone-of-interests test but that the Bennett plaintiffs met the test even though their **[**16]** interests were economic and not environmental. As a general rule, the Court held that

> whether a plaintiff's interest is "arguably . . . protected . . . by the statute" within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question (here, species preservation), but by reference to the particular provision of law upon which the plaintiff relies.

Id. at 1167. In other words, a plaintiff's interests need not track the overarching preservationist and environmentally protective purpose of the ESA itself but need only comport with the more specific particular provision of the ESA being invoked.

The Bennett plaintiffs complained that the FWS had not used the best available science as required under 16 U.S.C. § 1536(a)(2). The Court reasoned that the "best scientific and commercial data" provision of the ESA was intended, at least

in part, "to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives," and that plaintiffs' economic interests fell within that zone even though their interests did not follow the general preservationist **[**17]** thrust of the ESA itself. *Bennett v. Spear*, 117 S. Ct. at 1168. Like the plaintiffs in *Bennett v. Spear*, plaintiffs here have prudential standing to challenge the agency's use of the best scientific and commercial data in listing the fairy shrimp.[6]

Even before *Bennett v. Spear*, the D.C. Circuit recognized that a party can meet the prudential standing test by qualifying either as a regulated interest or a protected interest. *Hazardous Waste Treatment Council v. Thomas*, 280 U.S. App. D.C. 296, 885 F.2d 918, 922 (D.C. Cir. 1989) ("HWTC"). The court reasoned that those who are regulated "have the incentive to guard against any administrative attempt to impose a greater burden than that contemplated by Congress," just as environmental **[**18]** groups may serve as watchdogs to assure that the agency fulfills its responsibilities under the law. 885 F.2d at 922. The party, however, must be "regulated by the particular regulatory action being challenged." *Id.* As the Supreme Court has explained:

> In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiffs' interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding.

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[6] In view of this conclusion, the Court does not reach the question of whether plaintiffs' claims might have been brought under the citizen-suit provision, in which case the zone-of- interests test would not apply to them at all. *Bennett v. Spear*, 117 S. Ct. at 1162.

Clarke v. Securities Industry Assoc., 479 U.S. 388, 399, 93 L. Ed. 2d 757, 107 S. Ct. 750 (1987).

[*901] Defendant-intervenors argue that plaintiffs are not regulated by the listing itself but only will be regulated by its eventual enforcement. They also contend that Congress contemplated imposing on landowners precisely the sort of economic burden complained of by plaintiffs when it passed the ESA because it explicitly decided that listing decisions are not to be made on economic bases. Under this theory, defendant-intervenors maintain, plaintiffs are not **[**19]** challenging an administrative attempt to impose a "greater burden" than that contemplated by Congress, as required by the test laid out in HWTC, because the burden of the listing is no "greater" than Congress intended it to be.

The Court is not persuaded by this argument. As soon as the fairy shrimp were listed, it became a violation of the ESA to significantly modify fairy shrimp habitat. Section 9 of the ESA makes it unlawful for any person to "take any such [listed endangered] species within the United States or the territorial sea of the United States." 16 U.S.C. 1538(a)(1)(B). Under the ESA the term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The term "harm" as used in the ESA's definition of "take" includes significant habitat modification or degradation where it actually kills or injures wildlife. *Babbitt v. Sweet Home Chapter of Communities for Greater Oregon*, 515 U.S. 687, 115 S. Ct. 2407, 2418, 132 L. Ed. 2d 597 (1995). Since plaintiffs are landowners who already have modified, or are in the process of modifying or are about **[**20]** to modify the fairy shrimp's habitat, they are directly regulated by the

listing of the fairy shrimp and they therefore have prudential standing under the ESA.[7]

V. PROCEDURAL CHALLENGES

Plaintiffs challenge the fairy shrimp listing on a variety of procedural grounds. They assert that the FWS did not give sufficient public notice of and opportunity for comment on either its methodology or on the scientific report, the Simovich Study, on which it primarily relied. Plaintiffs also argue that the Simovich Study does not represent the best available science because it sampled only a **[**21]** 200 mile transect of the Central Valley and did not sample the entire state of California or Oregon. Plaintiffs further assert that the listing should be vacated because it was not promulgated within the ESA's statutory deadline and that the original petitions to list the fairy shrimp were fatally deficient because they contained insufficient information.

A. Notice Under the ESA and the APA

An agency need not provide opportunity for notice and comment on all changes made to a proposed rule. A final rule may deviate from the proposed rule if the final rule is a "logical outgrowth" of the proposed rule. *Solite Corp. v. EPA*, 293 U.S. App. D.C. 117, 952 F.2d 473, 484-85 (D.C. Cir. 1991); *see Omnipoint Corp. v. FCC*, 316 U.S. App. D.C. 259, 78 F.3d 620, 631-32 (D.C. Cir. 1996); *Small Refiner Lead Phase-Down Task Force v. EPA*, 227 U.S. App. D.C. 201, 705 F.2d 506, 546-47 (D.C. Cir. 1983). In determining how much notice is enough,

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[7] The Court also notes that under defendant-intervenors' theory of standing, the plaintiffs in both *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995), and *Endangered Species Comm. v. Babbitt*, 852 F. Supp. 32 (D.D.C. 1994), might well have lacked standing. The Court is unwilling to assume that these plaintiffs merely slipped between the judicial cracks.

the Court must decide "how well the notice that the agency gave served the policies underlying the notice requirement." *Small Refinery Lead Phase-Down Task Force v. EPA*, 705 F.2d at 547. The three purposes of notice requirements are to ensure **[**22]** that agency regulations are tested by exposure to diverse public comment, to ensure fairness and an opportunity to be heard, and to enhance judicial review. *Id.* These interests are balanced against the public interest in expedition and finality. *Id.*[8] **[**23]**

[*902] Plaintiffs complain that they were not put on notice that the FWS was going to rely on the concept of "vernal pool complexes" rather than "individual vernal pools" in defining fairy shrimp habitat. The Proposed Rule referred to vernal pool complexes several times in describing the habitat of the fairy shrimp, and the Final Rule concluded that based on "the genetic characteristics of the . . . fairy shrimp, as well as ecological conditions, . . . populations of [fairy shrimp] are defined by pool complexes rather than by individual vernal pools." Final Rule, 59 Fed. Reg. at 48137, 48141. This reliance on complexes effectively reduces the number of fairy shrimp populations, rendering the species more likely to be found to be endangered or threatened, and plaintiffs argue that they were not on notice that this critical determination would be made in this way.

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[8] In *Solite Corp. v. EPA*, the D.C. Circuit upheld a rulemaking in which the EPA relied on data not available for notice and comment in the proposed rule, reasoning that the data was "supplementary," that it "expanded on and confirmed information contained in the proposed rulemaking and addressed alleged deficiencies in the pre-existing data," that the methodology "remained constant and . . . the added data was used to check or confirm prior assessments," and that "critical elements of the proposal did not change." *Solite Corp. v. EPA*, 952 F.2d at 484-85. By contrast, where the methodology of a report was widely disputed, Judge Sporkin held that it was error for the agency not to make the report available for notice and comment. *Endangered Species Comm. v. Babbitt*, 852 F. Supp. at 37.

The Proposed Rule mentioned vernal pool complexes four times (A.R. at 480, 482, 483, 483), and at least one scientist explained that it is standard practice to assess fairy shrimp habitat in terms of complexes. Letter from Dr. Richard Grosberg (May 18, 1993), A.R. at 258. Indeed, the entire thrust of the Proposed Rule focused **[**24]** on the extent of the fairy shrimp vernal pool habitat, and plaintiffs knew or should have known that the method of assessing population was at issue.[9] While the proposed rule may not explicitly have defined how a particular "complex" was measured or determined, plaintiffs certainly had sufficient notice to enable them to challenge the concept itself. The Court finds that plaintiffs were on notice that the FWS would consider vernal pool complexes as a basis for determining fairy shrimp populations. The Court also concludes that the use of this methodology was neither arbitrary nor capricious.[10] **[**25]**

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[9] Plaintiffs also argue that FWS was arbitrary and capricious because it relied on the "vernal pool complex" model to list the fairy shrimp but on an "individual vernal pool" model in declining to list the California linderiella. Defendants respond that with respect to the linderiella, the FWS did not merely count the number of populated pools but determined more fundamentally that the amount of suitable linderiella habitat was greater than for the other species and that the linderiella had a more extensive range, based in large part on the Sugnet Report submitted by plaintiffs' experts. Defs.' Opp'n at 10 n.7.

[10] It bears emphasis that plaintiffs offer no evidence that this methodology is flawed in any way; indeed they concede as much and argue only that they were not properly informed of the methodology beforehand. Pls.' Reply at 2 n.2 ("Superior BIA does not contest FWS's decision that populations of Shrimp are best defined by 'complexes' as opposed to individual pools. We argue, however, that FWS acted arbitrarily by failing to articulate its methodology in applying the 'complex' model.").

Plaintiffs also assert that they were deprived of notice of and the opportunity to comment on the Branchiopod Research Group Study, a key sampling study of fairy shrimp abundance relied on by the FWS in its Final Rule and authored principally by Dr. Marie A. Simovich. Invertebrate Study: 1991-1993: PGT-PG&E Pipeline Expansion Project ("Simovich Study"), A.R. at 2663-2717 (Volume I), 2718-2795 (Volume II), and 3166-3383 (Volume III); *see* 59 Fed. Reg. at 48141. The study sampled a 200-mile north-south transect in the Sacramento Valley and documented the paucity of fairy shrimp in the sampled area. Simovich **[**26]** Study, Volume II at 6-15, Volume III at 159, A.R. at 2723-40, 3830. While the study itself does not appear to contain explicit conclusions about the threatened or endangered status of the fairy shrimp, the three crustacean biologists who conducted the research for the FWS relied on it, as well as on their own professional expertise, in concluding that fairy shrimp are rare throughout their ranges and recommending that they be listed. *See* Letter from Marie A. Simovich (July 2, 1992), A.R. at 573-74; Letter from Marie A. Simovich (Sept. 4, 1992) at 3-4, A.R. at 872-73; Letter from Richard C. Brusca (June 16, 1992), A.R. at 527-30; Letter from Jamie L. King at 3 (Sept. 11, 1992), A.R. at 896. The FWS received the Simovich Study during the initial notice and comment period itself and did not subsequently make it available for public comment.

Because the Final Rule relies heavily, although not exclusively, on the Simovich Study for the important proposition that **[*903]** fairy shrimp are rare within their ranges, 59 Fed. Reg. at 48141, the study should have been made available for notice and comment. Fundamentally, however, the Final Rule does not turn on the Simovich Study results but rests **[**27]** on a broad constellation of data and factors. Furthermore, even the conclusion that fairy shrimp are rare within their ranges has other support in the record. *Cf. Endangered Species Comm. v. Babbitt*, 852 F. Supp. at 37. Indeed, many experts

recommended listing the species without relying on the Simovich Study.[11] The Court concludes that the failure of the FWS to submit the Simovich Study to public notice and comment does not rise to the level of arbitrary and capricious agency action and that its failure to do so therefore does not warrant vacating the Final Rule. *See City of Las Vegas v. Lujan*, 891 F.2d at 935. **[**28]**

The only research identified by plaintiffs that contradicts the Simovich Study is the report prepared by Sugnet & Associates, an environmental consulting firm retained by plaintiffs. *See* Preliminary Compilation of Documented Distribution, Fairy Shrimp and Tadpole Shrimp Proposed for Listing, California 1993 ("Sugnet Report") (Apr. 29, 1993), A.R. at 2849-2888. It is abundantly clear from the record that the FWS gave careful consideration to the Sugnet Report and even relied on some of its data in deciding not to list the linderiella. 59 Fed. Reg. at 48138, 48140-41, 48145-46. *See also* Defendant-Intervenors' Mem. at 32 & n.22. Furthermore, the Sugnet Report, and its finding that fairy shrimp are more abundant than previously believed, is itself controverted. *See* Letter from Dr. Richard Grosberg (May 18, 1993), A.R. at 258-60. The Court concludes that the FWS's listing decision was sufficiently supported by scientific evidence beyond the Simovich Study and that in reaching its decision the FWS was aware of and gave careful consideration to the only opposing view (the Sugnet Report). The FWS engaged in a sufficiently careful evaluation of the evidence to make it inappropriate

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[11] Letters from Dr. Denton Belk (June 27, 1992 and Aug. 24, 1992), A.R. at 560, 644; Letter from Dr. Robert Holland (Sept. 18, 1992), A.R. at 927-32; Letter from Professor Clyde H. Erickson (July 7, 1992), A.R. at 575; Letter from Dr. Joel W. Martin (Sept. 8, 1992), A.R. at 881; Letter from Dr. Alan E. Launer (Sept. 11, 1992), A.R. at 892; Letter from Dr. Richard Grosberg (May 18, 1993), A.R. at 258-60; Memorandum from the Invertebrate Working Group (Aug. 21, 1992), A.R. at 643.

[**29] for this Court to vacate the Final Rule on that basis. *See Marsh v. Oregon Natural Resources Defense Council*, 490 U.S. at 377-78.

Plaintiffs further attack the FWS's reliance on the Simovich Study under the theory that it does not represent the best available science. The ESA requires the Secretary to make listing determinations "solely on the basis of the best scientific and commercial data available . . . ." 16 U.S.C. § 1533(b)(1)(A). Plaintiffs argue that the Simovich study is not the best available science because it only sampled a 200-mile transect of the Central Valley, because the sampling was not "random," and because it relies on the indeterminate concept of vernal pool complexes. As noted, however, the FWS relied on a great deal of scientific and commercial data in addition to the Simovich Study.[12] Most importantly, plaintiffs have pointed to no data that was omitted from consideration by the FWS. While it would have been advisable for the Simovich Study to have been tested in the crucible of public notice and comment, the FWS appears to have assembled and evaluated all the available data on the fairy shrimp of which the Simovich Study was only one element, albeit [**30] an important one. In light of the comprehensive quality of the FWS's data collection, the Court finds that the agency relied on the best available science pursuant to Section 1533(b)(1)(A).

B. The ESA's Statutory Deadline

Plaintiffs argue that the listings should be vacated because they were not promulgated within the ESA's statutory deadline. Not only do they offer no authority for this proposition but recent case law is to the contrary. *See Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1399-1401 (9th Cir. 1995) (Secretary's failure to list species within 18 months after proposal did not bar listing). Plaintiffs reliance on 16 [*904]

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[12] *See supra* n11.

U.S.C. § 1533(b)(6)(B)(ii) is misplaced since this section only applies where the Secretary has found insufficient evidence to list a species.

C. The Original Petitions to List

Plaintiffs challenge as fatally deficient the original petitions to list the fairy shrimp, arguing that they contained insufficient information to support the **[**31]** listing. The plain language of the ESA indicates, however, that the Secretary's finding that a petition is warranted is not subject to judicial review. 16 U.S.C. § 1533(b)(3)(C)(ii) states: "Any negative finding described in subparagraph (A) and any finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review." A finding that a petition is warranted is controlled by subparagraph (B)(ii), the subparagraph expressly left out of the judicial review provision. Moreover, even if this Court had the authority to review the warranted finding, the standard is a generous one: the Secretary need only determine whether the petition includes "substantial information [which is] that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." 50 C.F.R. § 424.14(b)[13] Plaintiffs' challenge on this basis must fail. **[**32]**

VI. THE SERVICE'S STATUTORY AUTHORITY AND ALLEGED VIOLATION OF ITS OWN POLICIES

A. Listing a Distinct Invertebrate Population

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[13] 50 C.F.R. § 424.14(b) does not, as plaintiffs assert, require that a petitioner include a narrative or any other specific kind of information in the petition but only that the Secretary consider such elements among others.

16 U.S.C. § 1532(16) permits the listing of a distinct population of a vertebrate species but not of an invertebrate species. Plaintiffs argue that because the FWS listed the fairy shrimp, an invertebrate species, based on the analysis of isolated populations, it has in effect listed a distinct population of an invertebrate species and thereby exceeded its statutory authority under the ESA. To put it another way, plaintiffs argue that the FWS's sampling data is inadequate to prove that each of the four fairy shrimp species is actually endangered. This argument essentially recasts plaintiffs' best available scientific evidence argument that defendants have not properly measured the extent, range and scarcity of the fairy shrimp species. *See supra* at 15-17. Again, plaintiffs point to no evidence that the fairy shrimp in the vernal pools studied by the myriad experts relied on by the FWS represent a distinct population of fairy shrimp or that the four listed fairy shrimp species are not valid species. The FWS did not list a distinct invertebrate **[**33]** population, *cf. Carlton v. Babbitt*, 900 F. Supp. 526, 528-29 (D.D.C. 1995), and plaintiffs' challenge on this basis therefore fails.

B. Did the FWS Violate Its Own Policies?

Plaintiffs argue that the FWS violated its own internal policy statements with respect to (1) independent peer review, see Notice of Policy Statement, 59 Fed. Reg. 34270 (July 1, 1994); (2) using primary and original sources, *see* Notice of Policy Statement, 59 Fed. Reg. 34271 (July 1, 1994); and (3) providing notice regarding the kinds of land use activities that might expose plaintiffs to liability, *see* Notice of Policy Statement, 59 Fed. Reg. 34272 (July 1, 1994). Defendants respond that agency policy statements do not create enforceable rights and that in any event these policies were promulgated or went into effect after the notice and comment period and thus are inapplicable.

> The touchstone for enforceability [of an agency rule or statement] is agency intent. . . . The binding quality of a particular rule or statement will depend on whether the agency intended to establish a substantive rule, one which is not merely interpretive but which creates or modifies rights that can **[**34]** be enforced against the agency.

Jackson v. Culinary School of Washington, 307 U.S. App. D.C. 123, 27 F.3d 573, 584 (D.C. Cir. 1994). *See also Vietnam Veterans of America v. Secretary of the Navy*, 269 U.S. App. D.C. 35, 843 F.2d 528, 536-38 (D.C. Cir. 1988). The APA specifically exempts "general statements of policy" from the requirements of notice and comment, 5 U.S.C. § 553(b)(A), although such statements **[*905]** must either be published in the federal register or made available for public inspection and copying. 5 U.S.C. §§ 552(a)(1)(D) and (a)(2)(B).

The stated purpose of the FWS peer review policy is to "clarify the role of peer review" under the ESA; it is "intended to complement and not circumvent or supersede the current public review process." 59 Fed. Reg. at 34270. The policy is not an APA promulgated regulation of the sort held to be enforceable against an agency. *Cf. Mine Reclamation Corp. v. FERC*, 308 U.S. App. D.C. 152, 30 F.3d 1519, 1524 (D.C. Cir. 1994). Rather, the language of the policy resembles the sort of nonbinding policy held unenforceable in *Pacific Gas & Electric Co. v. FPC*, 164 U.S. App. D.C. 371, 506 F.2d 33, 38 (D.C. Cir. 1974). *See* **[**35]** KENNETH CULP DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.2 at 228-31 (1994 & Supp. 1996). The same is true of the FWS original source policy statement, 59 Fed. Reg. 34271, and the FWS notification policy statement, 59 Fed. Reg. 34272. Both

use language reflecting the agency's intention that they be nonbinding.[14]

Even if these policies were binding on the **[**36]** FWS, at least two of them took effect too late to affect the fairy shrimp listing. The peer review policy became effective July 1, 1994, but it primarily governs the management of public comment periods, which, for the fairy shrimp, closed on September 22, 1992. Similarly, the notification policy applies only to species listed after October 1, 1994. The final fairy shrimp listings occurred on September 19, 1994. The FWS's decision to list the fairy shrimp cannot be overturned based on the FWS's alleged noncompliance with its own, nonbinding policy statements.

VII. FAILURE TO DESIGNATE CRITICAL HABITAT

The ESA instructs that concurrently with listing a species the Secretary of the Interior shall, "to the maximum extent prudent and determinable," designate any habitat of such species "which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A).[15] The implementing regulations

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[14] Even if the notification policy were binding, it states that "it is the policy of the Service to identify, to the extent known at the time a species is listed, specific activities that will not be considered likely to result in violation of section 9 [of the ESA]. To the extent possible, activities that will be considered likely to result in violation also will be identified in as specific a manner as possible." 59 Fed. Reg. at 34272 (emphasis added). In other words, the FWS policy promises no more than to identify some safe activities, not, as plaintiffs would have it, to delineate the full extent of plaintiffs' potential liability.

[15] The ESA further requires:

> A final regulation designating critical habitat of an endangered species or a threatened species shall be

(continued...)

explain in relevant part that "[a] designation of critical habitat is not prudent when . . . the species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species . . ." 50 C.F.R. § 424.12(a)(1). **[**37]**

In this case, the Secretary explicitly decided that it would **[**38]** not be prudent to designate critical fairy shrimp habitat, citing the fear that "the publication of precise maps and descriptions of critical habitat in the Federal Register would make these species more vulnerable to incidents of vandalism." Final Rule, 59 Fed. Reg. at 48151; *see* Proposed Rule, 57 Fed. Reg. at 19861 (designation of critical habitat "likely would increase the degree of threat from vandalism or other human activities"). Plaintiffs complain that the failure to designate critical habitat violates the ESA and also deprives landowners

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[15] (...continued)
published concurrently with the final regulation implementing the determination that such a species is endangered or threatened, unless the Secretary deems that—

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

16 U.S.C. § 1533(b)(6)(C).

of the mechanism by which they could bring economic concerns to the Secretary's attention and obtain notice of what kinds of activities may expose them to liability. **[*906]**

In support of the decision of the FWS not to designate critical habitat, defendants point to a number of incidents of destruction of habitat documented in the administrative record. A.R. at 190, 263A, 573-74, 591, 972, 1011, 1011A, 1012; *see also* A.R. at 1124-29. Only one of these incidents, however, expressly refers to vandalism. *See* Memorandum from FWS Sacramento Field Office (July 3, 1991), A.R. at 1012 (describing "selective destruction" of vernal pools). The **[**39]** other cited sources chronicle generic instances of habitat destruction without discussing the motivation behind the destruction. The mere fact of habitat destruction, however, does not in itself militate against designating critical habitat. Indeed, one of the documents cited by the FWS actually supports the opposite conclusion. *See* Letter from Riverside County Planning Department (July 7, 1992), A.R. at 591-92. This letter describes future developments planned for fairy shrimp habitat, indicating that those developments will continue as scheduled unless the fairy shrimp are listed. The FWS has not explained in any way why designating critical habitat would not further protect such habitat already scheduled for development.

The FWS appears to rely on two assumptions, both without any support in the record: first, that owners of critical habitat who learn of the presence of fairy shrimp on their property would increase their developmental pace in direct violation of the ESA, and, second (the other side of the coin perhaps), that so long as critical habitat is not designated such landowners would remain unaware of their potential liability and therefore not develop their property **[**40]** apace. The Court finds this reasoning, if it can be called that, attenuated and unsupported by the record. The defendants' asserted reason—vandalism—is not sufficiently substantiated by the single record reference to intentional vandalism in light of the

strong presumption that critical habitat will be designated concurrently with the listing of a species. *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 626 (W.D. Wash. 1991); *cf. Fund for Animals v. Babbitt*, 903 F. Supp. 96, 115-17 (D.D.C. 1995) (upholding Secretary's decision to deny a petition to designate critical habitat). The case therefore shall be remanded to the FWS for the limited purpose of clarifying or reconsidering this portion of the Secretary's decision. On remand, the Secretary must either initiate the process of designating critical habitat or provide adequate record support and reasoned explanation for the determination that such a designation is not prudent. This limited remand should not be interpreted as affecting the validity of the listing itself.[16] **[**41]**

VIII. THE COMMERCE CLAUSE AND THE TENTH AMENDMENT

Plaintiffs and amici argue that the final listing of the fairy shrimp (although not the ESA itself) exceeds the federal commerce clause power and violates the Tenth Amendment because there is no nexus between the fairy shrimp and interstate commerce and because the listing interferes with state and local sovereignty over land use. Specifically, they argue that this listing cannot stand in view of the Supreme Court's recent interpretation of the Commerce Clause in *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), because the fairy shrimp do not "substantially affect"

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[16] In light of this result, the Court does not reach plaintiffs' argument that the failure to designate critical habitat and the FWS's failure to follow its own policy of apprising landowners of what activities might trigger liability violate plaintiffs' right to due process. Pls.' Reply at 29. The Court notes, however, that since plaintiffs participated fully in the notice and comment process leading to the Final Rule and since they also assert that they have already taken costly steps to comply with the listing and draft guidelines, the argument underlying their due process claims that they have not been properly put on notice is unavailing.

interstate commerce. *See United States v. Olin Corp.*, 927 F. Supp. 1502, 1996 WL 276984 (S.D. Ala. 1996) (interpreting Lopez as invalidating and application of CERCLA requiring the clean-up of a 20-acre solid waste management site because the pollution at that site did not affect interstate commerce).

The Court in *Lopez* struck down the Gun-Free School Zones Act, 18 U.S.C. § 922(q), which made it a federal offense to possess a firearm in a school zone, reasoning that

> Section 922(q) is a criminal statute **[**42]** that by its terms has nothing to do with "commerce" or any sort of economic enterprise, **[*907]** however broadly one might define those terms. Section 922(q) itself is not an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated.

United States v. Lopez, 115 S. Ct. at 1630-31. The Court also invalidated Section 922(q) because it criminalized mere possession and "contained no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* at 1631.

In contrast to the statutory provision at issue in Lopez, the ESA directly and expressly regulates the import, export and sale of listed species in interstate commerce. 16 U.S.C. §§ 1538(a)(2)(A), (C), (D).[17] At the time of its passage, "the Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180, 57 L. Ed. 2d 117, 98 S. Ct.

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[17] Defendants have provided declarations of at least one out-of-state expert who has bought or sold fairy shrimp specimens (before they were listed) and who has traveled to California to study them. *See* Declaration of Denton Belk PP 1, 2, 4, 5 (Jan. 31, 1996),

2279 (1978). The Supreme Court described Congress' extraordinarily broad [**43] intent when passing the ESA:

> The legislative proceedings in 1973 are . . . replete with expressions of concern over the risk that might lie in the loss of any endangered species. Typifying these sentiments is the Report of the House Committee on Merchant Marine and Fisheries [stating]: ". . . . The value of this genetic heritage is, quite literally, incalculable. . . . From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations."

Id. at 177-78 (quoting H.R. Rep. No. 93-412, pp 4-5 (1973)) (emphasis in opinion). It would be hard to imagine a stronger expression of Congress' belief that species preservation substantially affects the national economic interest. [**44]

Several courts have upheld the ESA against similar commerce clause challenges, including one judge of this court. In *National Ass'n. of Home Builders v. Babbitt*, 949 F. Supp. 1 (D.D.C. 1996) (Urbina, J.), the court concluded that notwithstanding *Lopez*, "Congress has the constitutional power to protect wildlife," even where the endangered species at issue, the Delhi Sands Flower-loving Fly, was endemic to California and therefore in some sense was not "interstate" in character. *Id.* at 5-8. Similarly, the Ninth Circuit upheld the Eagle Protection Act, 16 U.S.C. § 668, against a commerce clause challenge, reasoning that "extinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity." *United States v. Bramble*, 103 F.3d 1475, 1481 (9th Cir. 1996).

The Ninth Circuit in Bramble also reaffirmed the reasoning of the pre-*Lopez* decision in *Palila v. Hawaii Department of Land and Natural Resources*, 471 F. Supp. 985,

994-95 (D. Hawaii 1979), *aff'd* 639 F.2d 495 (9th Cir. 1981). *See United States v. Bramble*, 103 F.3d at 1481 (quoting *Palila* with approval). In *Palila*, the court **[**45]** held that the listing under the Endangered Species Act of the Palila, a bird endemic only to Hawaii, did not exceed Congress' Commerce Clause power or violate the Tenth Amendment. The court noted that "Congress has determined that protection of endangered species anywhere is of the utmost importance to mankind . . . [and that] a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons . . . who come to a state to observe and study these species." 471 F. Supp. at 994-95. *See also Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993) (acknowledging that Congress could, under its commerce clause power, regulate wetlands that might have an impact on migratory birds). For the same reasons, the application of the ESA to the fairy shrimp is within Congress' commerce clause power.

Plaintiffs' position is untenable for two additional reasons. First, plaintiffs would have the Court invalidate the listing as an impermissible **[*908]** exercise of congressional power because it regulates only intrastate activity. Plaintiffs assume for the purpose of this argument **[**46]** that the fairy shrimp exist only in California and therefore that their preservation (or extinction) does not implicate Congress's interstate powers. Plaintiffs' challenge to the rationality of the listing itself under the APA, however, rests heavily on the assertion that fairy shrimp are more widely found than the FWS admits, and in particular, that their habitat stretches from Oregon to Mexico. *See* Pls.' Mem. in Support of Motion at 33 & n.22. In effect, plaintiffs concede that the actual extent of the fairy shrimp habitat may be less than certain. While plaintiffs are, of course, entitled to argue in the alternative, such factual uncertainty provides a shaky foundation for a constitutional challenge to a heartland application of the Endangered Species Act.

Second, although plaintiffs purport to levy merely an as-applied challenge to the ESA, their argument, if accepted, would undermine the Act's central across the board. According to plaintiffs, if a species is abundant and scattered plentifully across state lines, Congress is fully empowered under the Commerce Clause to protect it. But when that same species becomes more scarce and its population reduced to a single state, [**47] Congress's hands are suddenly tied. The court declines to read *Lopez* as hamstringing Congress in such an irrational fashion in a regulatory area of such important economic, scientific and environmental dimensions.

An Order consistent with this Opinion shall be entered this same day.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: 7/25/97

ORDER AND JUDGMENT

This case is before the Court on plaintiffs' motion for summary judgment, defendants' motion for summary judgment and defendant-intervenors' motion for summary judgment. Having carefully considered the filings of all the parties as well as amici, the arguments of counsel and the entire record in this case, and for the reasons stated in the accompanying Opinion issued this same day, it is hereby

ORDERED that plaintiffs' motion for summary judgment is GRANTED in part and DENIED in part. The Court finds defendants' decision not to designate critical habitat for the fairy shrimp to be arbitrary and capricious and not supported by the administrative record. Accordingly, that portion of the Secretary's decision is REMANDED to the Fish and Wildlife Service. The FWS shall file a Report with the Court [**48] on

or before September 25, 1997, in which it shall either inform the Court that critical habitat has or will be designated, provide record support for the determination that the designation of critical habitat is not prudent, or provide the Court with a date certain by which one of these alternatives shall be accomplished. All other aspects of the secretary's decision are upheld; it is

FURTHER ORDERED that defendants' motion for summary judgment is GRANTED in part and DENIED in part. With respect to all aspects of the Secretary's decision except the decision not to designate critical habitat, JUDGMENT is entered for defendants; and it is

FURTHER ORDERED that defendant-intervenors' motion for summary judgment is GRANTED in part and DENIED in part. With respect to all aspects of the Secretary's decision except the decision not to designate critical, habitat, JUDGMENT is entered for defendant-intervenors.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: 7/25/97

Appendix D–1

5 USCS § 553 (2001)

§ 553. Rule making

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include-

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

5 USCS § 706 (2001)

§ 706. Scope of review

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(D) without observance of procedure required by law;

Appendix E–1

LEXSTAT 16 u.s.c. 1533

UNITED STATES CODE SERVICE

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*** CURRENT THROUGH P.L. 107-36, APPROVED 8/20/01 ***

TITLE 16. CONSERVATION

CHAPTER 35. ENDANGERED SPECIES

16 USCS § 1533 (2001)

§ 1533. Determination of endangered species and threatened species

(a) Generally.

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce

pursuant to Reorganization Plan Numbered 4 of 1970 [*5 USCS § 903* note]--

(A) in any case in which the Secretary of Commerce determines that such species should--

(i) be listed as an endangered species or a threatened species, or

(ii) be changed in status from a threatened species to an endangered species,

he shall so inform the Secretary of the Interior, who shall list such species in accordance with this section;

(B) in any case in which the Secretary of Commerce determines that such species should--

(i) be removed from any list published pursuant to subsection (c) of this section, or

(ii) be changed in status from an endangered species to a threatened species,

he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

(C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

(3) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable--

(A) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or

a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(B) may, from time-to-time thereafter as appropriate, revise such designation.

(b) Basis for determinations.

(1) (A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been--

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data

available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

(3) (A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code [*5 USCS § 553*(e)], to add a species to, or to remove a species from, either of the lists published under subsection (c), the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

(B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

(ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

(iii) The petitioned action is warranted, but that--

(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) and to remove from such lists species for which the protections of the Act are no longer necessary,

in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

(C) (i) A petition with respect to which a finding is made under subparagraph (B)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

(ii) Any negative finding described in subparagraph (A) and any finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review.

(iii) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of the authority under paragraph 7 to prevent a significant risk to the well being of any such species.

(D) (i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code [*5 USCS § 553*(e)], to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

(ii) Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, the

Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

(4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section 553 of title 5, United States Code [*5 USCS § 553*] (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this Act.

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3), the Secretary shall--

(A) not less than 90 days before the effective date of the regulation--

(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

(C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;

(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and

(E) promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.

(6) (A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register--

(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either--

(I) a final regulation to implement such determination,

(II) a final regulation to implement such revision or a finding that such revision should not be made,

(III) notice that such one-year period is being extended under subparagraph (B)(i), or

(IV) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based; or

(ii) subject to subparagraph (C), if a designation of critical habitat is involved, either--

(I) a final regulation to implement such designation, or

(II) notice that such one-year period is being extended under such subparagraph.

(B) (i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period

specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

(ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

(iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that--

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than

one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

(7) Neither paragraph (4), (5), or (6) of this subsection nor section 553 of title 5, United States Code [*5 USCS § 553*], shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants, but only if--

(A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and

(B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each State in which such species is believed to occur.

Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

(8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this Act shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and

if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.

(c) Lists.

(1) The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b).

(2) The Secretary shall--

(A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

(B) determine on the basis of such review whether any such species should--

(i) be removed from such list;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b).

(d) Protective regulations. Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1) [*16 USCS § 1538*(a)(1)], in the case of fish or wildlife, or section 9(a)(2) [*16 USCS § 1538*(a)(2)], in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 6(c) of this Act [*16 USCS § 1535*(c)] only to the extent that such regulations have also been adopted by such State.

(e) Similarity of appearance cases. The Secretary may, by regulation of commerce or taking, and to the extent he deems advisable, treat any species as an endangered species or threatened species even though it is not listed pursuant to section 4 of this Act [this section] if he finds that--

(A) such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species;

(B) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and

(C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this Act.

(f) Recovery plans.

(1) The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable--

(A) give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity;

(B) incorporate in each plan--

(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;

(ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

(iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

(2) The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act [5 USCS Appx.].

(3) The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate

and the Committee on Merchant Marine and Fisheries of the House of Representatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed.

(4) The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan. The Secretary shall consider all information presented during the public comment period prior to approval of the plan.

(5) Each Federal agency shall, prior to implementation of a new or revised recovery plan, consider all information presented during the public comment period under paragraph (4).

(g) Monitoring.

(1) The Secretary shall implement a system in cooperation with the States to monitor effectively for not less than five years the status of all species which have recovered to the point at which the measures provided pursuant to this Act are no longer necessary and which, in accordance with the provisions of this section, have been removed from either of the lists published under subsection (c).

(2) The Secretary shall make prompt use of the authority under paragraph 7 of subsection (b) of this section to prevent a significant risk to the well being of any such recovered species.

(h) Agency guidelines; publication in Federal Register; scope; proposals and amendments: notice and opportunity for comments. The Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively. Such guidelines shall include, but are not limited to--

(1) procedures for recording the receipt and the disposition of petitions submitted under subsection (b)(3) of this section;

(2) criteria for making the findings required under such subsection with respect to petitions;

(3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of this section: and

(4) a system for developing and implementing, on a priority basis, recovery plans under subsection (f) of this section.

The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.

(i) Submission to State agency of justification for regulations inconsistent with State agency's comments or petition. If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments, or if the Secretary fails to adopt a regulation pursuant to an action petitioned by a State agency under subsection (b)(3), the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.